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IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1991

LAL R. BHAYA,
RICHARD CARNER,
WILLIAM J. HAESSLER,
HENRY A. PARZICK, and
EARLE WILLIAMS

Petitioners

v.

WESTINGHOUSE ELECTRIC CORPORATION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the courts below apply an unprecedented and improperly restrictive specific reference standard in excluding relevant evidence in an age discrimination case?

2. In light of this Court's directive in *Kotteakos v. U.S.*, 328 U.S. 750 (1946), did the Third Circuit Court of Appeals improperly apply the harmless error standard for criminal cases in a claim brought pursuant to the Age Discrimination in Employment Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Lal R. Bhaya, Richard Carner, William J. Haessler, Henry A. Parzick, and Earle Williams, pray that a writ of certiorari be issued to review the December 28, 1990 judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

After awarding damages in accordance with a jury verdict in an employees' age discrimination action [624 F.Supp. 921 (E.D. Pa. 1985)], the United States District Court for the Eastern District of Pennsylvania by Joseph A. Lord, III, Senior District Judge, granted defendant's motion for judgment notwithstanding the verdict on

December 30, 1986 in an unpublished decision. The United States Court of Appeals for the Third Circuit vacated and remanded [832 F.2d 258 (3d Cir. 1987)]. This Court denied defendant's Petition for Writ of Certiorari as reported at 488 U.S. 1004 (1989). Following remand, Judge Lord granted the employer's motion for new trial [709 F.Supp. 600 (E.D. Pa. 1989)], and the employees appealed. In a decision reported at 922 F.2d 184 (3d Cir. 1991), a majority panel of the Court of Appeals held that the District Court was justified in granting a new trial because of the admission of prejudicial testimony.

JURISDICTION

The most recent judgment of the United States Court of Appeals for the Third Circuit was entered on December 28, 1990. A timely Petition for Rehearing and Rehearing *In Banc* was denied on January 24, 1991 (Judges Higginbotham and Mansmann would have permitted rehearing), and this Petition is being filed within 90 days of that action.

Under 28 U.S.C. §1254(1), this Court has jurisdiction to review the judgment of the Court of Appeals. Subject matter jurisdiction existed in the District Court pursuant to 28 U.S.C. §1331 and 29 U.S.C. §626.

THE STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, §2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Title 28, United States Code
Rule 61 of the Federal Rules of Civil Procedure

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or

in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Title 28, United States Code
Rule 103(a) of the Federal Rules of Evidence

Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . .

Title 28, United States Code
Rule 401 of the Federal Rules of Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Title 28, United States Code
Rule 402 of the Federal Rules of Evidence

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Title 28, United States Code
Rule 403 of the Federal Rules of Evidence

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Age Discrimination in Employment Act
Title 29, United States Code, §623(a)

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .

STATEMENT OF THE CASE

Procedural History

On November 2, 1984, plaintiffs commenced the present action against defendant, Westinghouse Electric Corporation ("Westinghouse"), alleging that Westinghouse terminated their employment on or about December 17, 1982, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* On November 6, 1985, the matter proceeded to a nine day bifurcated trial before a jury which first found in favor of all plaintiffs on the issue of liability, and then in the damage phase, awarded to each plaintiff damages for past and future loss of wages. The jury also found that the violation by Westinghouse was wilful. On December 23, 1985, the District Court molded the jury's verdict in favor of the plaintiffs and against the defendant as follows: Lal Bhaya, $438,345.26; Henry Parzick,

$202,658.29; William Haessler, $363,539.21; Earle Williams, $247,166.00; and Richard Carner, $315,421.19. *Bhaya v. Westinghouse Electric Corporation,* 624 F.Supp. 921 (E.D. Pa. 1985). Defendant filed a timely post-trial motion requesting judgment notwithstanding the verdict or, in the alternative, a new trial, and a motion to amend the judgment.

On December 31, 1986, the District Court set aside the verdict of the jury and entered judgment for the defendant, Westinghouse, and against all plaintiffs. The trial court also dismissed as moot all other motions.

On November 2, 1987, the United States Court of Appeals for the Third Circuit, in an opinion by Judge Mansmann, vacated the decision of the trial court and remanded for reinstatement of the jury verdict. *Bhaya v. Westinghouse Electric Corporation,* 832 F.2d 258 (3d Cir. 1987). The Supreme Court of the United States denied review on January 9, 1989. *Westinghouse v. Bhaya, et al.,* cert. denied, 488 U.S. 1004 (1989).

On March 22, 1989, in response to defendant's renewed motion, the trial court granted a new trial as to all issues of liability and damages. *Bhaya v. Westinghouse Electric Corporation,* 709 F.Supp. 600 (E.D. Pa. 1989). The court's determination of the necessity for a new trial on the issue of liability centered on an out-of-court statement made to plaintiff, Henry A. Parzick, relating to the issue of discriminatory intent. After ruling that the out-of-court declaration did not constitute inadmissible double hearsay and that it was made within the scope of the declarant's employment with defendant, the trial court ruled that the statement was "probably" not relevant and if relevant, was "less probative than it was misleading . . ." *Bhaya v. Westinghouse Electric Corporation,* 709 F.Supp. at 603-604.

Plaintiffs' motion to certify the issue pursuant to the mandates of 28 U.S.C. §1292(b) was rejected by the trial court on April 7, 1989. On November 14, 1989, after six days of trial on the issue of liability, the jury rendered a

verdict for defendant and against all plaintiffs. Judgment was entered thereon on November 15, 1989.

A timely appeal was taken by plaintiffs requesting the Court of Appeals again to reverse the decision of the trial court and to reinstate the original judgment or, in the alternative, to find that errors committed by the court below upon retrial were substantial, thereby requiring a new trial. The matter was argued on October 11, 1990, before Judges Mansmann, Cowen and Alito. On December 28, 1990, a majority decision by Judge Alito denied plaintiffs' requests. Judge Mansmann dissented, holding that the Court's Order granting a new trial on liability issues was erroneous and that the original liability verdict should be reinstated. On January 24, 1991, plaintiffs' request for a rehearing was denied. Judges Higginbotham and Mansmann would have permitted rehearing. *Bhaya v. Westinghouse Electric Corporation*, 922 F.2d 184 (3d Cir. 1991).

Statement of the Facts

At the time of their termination on December 17, 1982, the five plaintiffs held positions as "negotiation engineers," a job progression which was virtually eliminated as part of a general reduction in force at defendant's Concordville, PA facility. The gravamen of plaintiffs' Complaint was that defendant deeply affected their job progression rather than making layoffs based on seniority from a pool consisting of negotiation engineers and two other closely related job progressions ("availability assurance engineers" and the "applications engineers") because the negotiation engineers were substantially older and because there was substantial financial benefit to eliminating older workers rather than younger ones.

Each plaintiff was a well-experienced, older engineer (57 years through 65 years), who had provided long service to Westinghouse (16 years through 40 years).

Each testified that the work he performed was transferred to substantially younger engineers in the other two progressions, and that he was well-qualified to perform all tasks remaining.

Plaintiffs' theories of recovery were further supported by the statistical labor-force analysis of Richard Andrulis, Ph.D., a qualified expert who concluded, without reservation, that "age was a determining factor" in the decision virtually to eliminate plaintiffs' job progression. Dr. Andrulis based that opinion on a family-by-family analysis of all positions affected by the layoff. He further proffered that his examination of the job descriptions of availability assurance engineers and negotiation engineers demonstrated that the responsibilities and requirements for each were similar. Dr. Andrulis suggested that the method which could have been used to effect the layoff without any age bias was to retain those persons in the job families of availability assurance engineer or applications engineer or negotiation engineer who had the highest seniority.

Importantly, he stated there were direct financial benefits to Westinghouse by discharging older workers rather than younger ones. He also testified from his analysis of seniority that plaintiffs would have remained in the employ of Westinghouse had their job family not been eliminated.

Dr. Andrulis' family-by-family analysis was supported by the testimony and exhibits of Dr. Bernard Siskin, defendant's statistical expert. Dr. Siskin pointed out that the average age of availability assurance engineers at the end of 1982 was 35.8 years and that they had been terminated as a family at the rate of 29.4%. Conversely, the average age of negotiation engineers at the end of 1982 was 48.9 years and they were terminated at the rate of 93.3%.

Westinghouse's defense for preferring the group of younger employees over the older ones was that its managers had determined that the functions of the negotiation engineers could easily be eliminated, while

the job tasks of the younger engineers could not be transferred without collective bargaining in accordance with the controlling labor agreement. The defendant's evidence in support of this defense consisted exclusively of oral testimony regarding its reason for eliminating that job progression. At no time did Westinghouse document its assertions that its decisions regarding whom to terminate were based on economic necessity and that the factors of age, pension or salary had not been considered.

James Borden, manager of the department in which plaintiffs were employed, testified that numerous meetings were held to consider all reduction-in-force options and that he attended executive meetings where Nick Kulokoski, divisional personnel director, provided guidance on labor laws, the collective bargaining agreement and compliance with discrimination laws. It was the testimony of Henry A. Parzick regarding one of these executive meetings that gives rise to the present petition.

Plaintiff Parzick testified that on November 3, 1982, after he and the other plaintiffs were informed of their termination at a meeting with James Borden and their supervisor, Thomas Kinlin, Mr. Parzick had a revealing conversation with Mr. Kinlin. Plaintiff Parzick testified that while "we just chatted," he was informed that at one of the executive management meetings conducted by Kulokoski, Kinlin witnessed an exchange between an unnamed manager and Kulokoski during a discussion about the termination of negotiation engineers:

> "A statement was made that maybe we shouldn't be eliminating this group. Maybe we're doing something illegal or against the contract, and Mr. Nick Kulokoski, who was the personnel manager of the division, said, let's give it a try. What do we have to lose?" N.T. Day 1:103.

It was the admission of this brief, single statement in a nine day trial that formed the trial court's basis for setting aside the jury's verdict.[1] Declaring first that the unnamed manager's question "probably was irrelevant" but that "if it was relevant, it was less probative than it was misleading and unfairly prejudicial," the trial court ruled that the evidence should have been excluded and granted a new trial. *Bhaya v. Westinghouse Electric Corporation,* 709 F.Supp. at 603-604.[2]

Applying highly deferential standards of review, the Court of Appeals concluded that "the trial judge had solid grounds for concluding that the out-of-court statements at issue had little if any relevance or probative value and that they created a substantial danger of 'unfair prejudice,' 'confusion of the issues,' and 'misleading the jurors.' " *Bhaya v. Westinghouse Electric Corporation,* 922 F.2d at 187.

Having ruled that the lower court's original exclusionary ruling was correct, the Court of Appeals held that "the trial judge was *required* under *McQueeney v. Wilmington Trust Co.,* 779 F.2d [916] at 928 [(3d Cir. 1985)], to grant a new trial unless it was 'highly probable' that the error did not affect any 'substantial rights.' " *Bhaya v. Westinghouse Electric Corporation,* 922 F.2d at 189 (emphasis added).

REASONS FOR GRANTING THE WRIT

The exceptional importance of uniformity regarding evidentiary matters in all courts within our federal system of justice is axiomatic. One hundred and eighty days following January 2, 1975, all actions, cases and

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1. At the time of the second trial, plaintiff Parzick was precluded from relating these admissions of discriminatory intent or further explaining their context.

2. It is probative that Kinlin never affirmatively denied the event, only that he "could not remember" the conversation. He also stated, however, that he believed plaintiff Parzick and did not believe he was lying when he testified.

procedures became linked by the common strictures contained in the Federal Rules of Evidence. All federal courts would therefrom be inextricably bound by the basic precepts set forth in eleven chapters of guidance to federal courts in both criminal and civil matters.

> "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Rule 102, Federal Rules of Evidence.

The Rules of Evidence demand uniformity throughout the federal system. Serious conflict between the various District and Circuit Courts threatens the orderly application of uniform standards of criminal and civil justice.

The decision of the Third Circuit Court of Appeals in the present matter presents a serious disruption of the federal evidentiary scheme and gives to this Court the important opportunity to return the Third Circuit Court of Appeals to standards of admissibility and excludability of evidence mandated by this Court and employed throughout the federal system. The Third Circuit, by its ruling herein, has created a requirement of "specificity" relating to the admissibility of relevant evidence which has been previously rejected by this Court and universally condemned throughout the Circuit Courts of Appeal, including past Third Circuit decisions.

The Third Circuit Court of Appeals has also embraced a clear minority position on the second issue presented here of whether the same standard must be employed in resolving what constitutes "harmless error" in a civil case as is used in criminal cases. The split in the Circuits on this important issue, which has not been previously resolved by this Court, requires immediate consideration. The facts presented by this case will permit a final determination of a non-Constitutional harmless error standard in civil cases, which comprise

the great majority of matters presented each year to our federal courts.

I. THE "SPECIFICITY" MANDATE IMPOSED BY THE THIRD CIRCUIT IN RELEVANCY DETERMINATIONS VIOLATES THE DIRECTIVES OF THIS COURT REGARDING DISCRIMINATION CASES.

In discrimination cases, including those brought pursuant to the Age Discrimination in Employment Act, this Court has firmly directed that unlawful motive can and often must be proven by circumstantial as well as direct evidence. A plaintiff "may succeed in [showing pretext] either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't. of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981).

In the context of its sensitivity to the realities of proving improper animus in claims of discrimination in employment, this Court again, two years later, refused a direct evidence standard:

> "All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes." *U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 716 (1983).

Noting again that "the plaintiff may prove his case by direct or circumstantial evidence" [*Id.*, at 714 n. 3], the Court vacated the judgment of the District Court and remanded the matter for further proceedings because the trial court had "erroneously thought that respondent was required to submit direct evidence of discriminatory intent." *Id.*, at 717.

Even the Third Circuit Court of Appeals has consistently adhered to the dictate that a "smoking gun" is not necessary and that a plaintiff in an age discrimination case can establish the existence of discriminatory animus by means of indirect proof not specifically relating to age. *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 49 (3d Cir. 1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898-99 (3d Cir. 1987), cert. dismissed, 483 U.S. 1052 (1987); *Gavalick v. Continental Can Co.*, 812 F.2d 834, 853 (3d Cir. 1987), cert. denied, 484 U.S. 979 (1987).

This requirement of proof of liability in discrimination cases logically demands that District Courts resolve evidentiary issues with appropriate deference to the *Burdine/Aikens* mandates. In the present case, the Third Circuit Court of Appeals has not only ignored these directives, but has established a contrary rule of relevancy which would exclude all evidence of discriminatory intent other than direct name calling. Such a standard cannot be permitted to stand and improperly influence cases in the future.

A. Relevancy and Probative Value

Rule 402 of the Federal Rules of Evidence, more than any other Rule of Evidence, seems to state an irrefutable postulate: that which is relevant is admissible; that which is not relevant is not admissible.[3] These apparent axiomatic statements "are 'a presupposition involved in the very conception of a rational system of evidence.' Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests." Notes of Advisory Committee on 1972 Proposed Rules, Rule 402 of the Federal Rules of Evidence.

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3. The Rule also reserves to further Rules of Evidence, the Constitution, an Act of Congress, or by other rules of the Supreme Court, the right to exclude evidence otherwise relevant. See discussion of Rule 403 of the Federal Rules of Evidence, *infra*.

Relevant evidence is, of course, defined in Rule 401 of the Federal Rules of Evidence:

> " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In determining what is relevant, the trial court's function is governed by a "reasonable man" standard, taking into account all of the unique circumstances presented to the trier of fact:

> "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? . . .
>
> The standard of probability under the rule is 'more * * * probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic. As McCormick §152, p. 317, says, 'A brick is not a wall,' or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, ' * * * [I]t is not to be supposed that every witness can make a home run.' " Notes of Advisory Committee on 1972 Proposed Rules, Rule 401 of the Federal Rules of Evidence.

"Relevant evidence" is therefore that evidence which in some degree advances the inquiry and thus has probative value:

> "Trial courts must not lose sight, however, of the liberal nature of the Federal Rules of Evidence. It must be remembered that '[t]he federal rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all.' *United States v. Carranco,* 551 F.2d 1197 (10th Cir.

> 1977)." *Young v. Illinois Cent. Gulf R. Co.*, 618 F.2d 332, 337 (5th Cir. 1980).

See also *Stauffer v. McCrory Stores Corp.*, 155 F.Supp. 710 (W.D. Pa. 1957).

Even the slightest showing of relevance may be sufficient if the matter sought to be proved is more likely after admission than before. *United States v. Anderson*, 798 F.2d 919, 926 (7th Cir. 1986); *Averitt v. Southland Motor Inn of Oklahoma*, 720 F.2d 1178, 1181 (10th Cir. 1983); *United States v. Federico*, 658 F.2d 1337 (9th Cir. 1981).

A judge also cannot prevent the consideration of evidence because of the bench's view of its impact on the overall case:

> ". . . a judge in our system does not have the right to prevent evidence from getting to the jury merely because he does not think it deserves to be given much weight. See, e.g., *Joy Mfg. Co. v. Sola Basic Industries, Inc.*, 697 F.2d 104, 110-12 (3d Cir. 1982)." *Western Industries, Inc. v. Newcor Canada, Ltd.*, 739 F.2d 1198, 1202 (7th Cir. 1984).

In determining whether evidence is, in fact, relevant, the possibility of another explanation or inference to be drawn cannot be employed to deny admission. *United States v. Snow*, 517 F.2d 441 (9th Cir. 1975):

On this issue of probative value, the majority opinion of the Third Circuit discounted the statements proffered by plaintiff, Henry Parzick, "because they lacked any appreciable link to age discrimination or the ADEA." *Bhaya v. Westinghouse Electric Corporation*, 922 F.2d at 187. Judge Alito demanded a specific age reference before assigning any relevance or probative

weight. *Id.*, at 188. Certainly, this exaggerated "specificity requirement" is contrary to the recognized principles controlling the degree of proof necessary in discrimination actions even in that Court before Judge Alito's decision. As cogently related by Judge Mansmann in her dissent,

> " . . . direct evidence in the form of a 'smoking gun' is not required to prove discrimination. *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989) ('there is usually no "smoking gun" evidence of intentional discrimination'); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 895 (3d Cir.) (in banc), *cert. dismissed*, 483 U.S. 1052 . . . (1987) ('[b]ecause the plaintiff may meet in alternate ways his burden to show that age was a determinative factor in his discharge, the plaintiff is entitled to show that the employer's explanation was pretextual by proffering evidence which is circumstantial or indirect as well as that which shows directly discriminatory animus'); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 791 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 . . . (1986) (employer statements to the employee that s/he is being fired because of age will often be difficult to obtain); *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984) (in employment discrimination cases direct evidence of the employer's motivation is unavailable or difficult to acquire)." *Bhaya v. Westinghouse Electric Corporation*, 922 F.2d at 191-192.

The majority's crabbed view of relevance required plaintiffs, in effect, to produce smoking gun evidence. To disallow evidence of the kind excluded would be to deny to plaintiffs the basic building blocks of inference that a discrimination case, in particular, demands.

Judge Richard A. Posner, Circuit Judge of the Seventh Circuit Court of Appeals, has addressed this very issue in the context of finding that the lower court

abused its discretion in excluding evidence in a sex discrimination action:

> "[Careful appellate review] is particularly necessary in a case like this, where the substantive issue is whether there was intentional discrimination in employment. Proof of such discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible . . . A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." *Riordan v. Kempiners*, 832 F.2d 690, 697-98 (7th Cir. 1987).

See also *McKnight v. General Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990) (alleged trial errors were insignificant "considering the latitude that plaintiff in a discrimination case must be allowed in order to construct a circumstantial case.")

These principles are equally well-settled in virtually all other federal jurisdictions:

> "Where a plaintiff seeks to prove discriminatory intent, the probative value of statements revealing the racial attitudes of the decisionmaker is great. This is so because of the inherent difficulty of proving state of mind. As the Supreme Court has noted, '[t]here will seldom be "eyewitness" testimony as to the employer's mental process.' *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)." *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1133 (4th Cir. 1988).

In light of these statements of controlling law, it was the dissent of Judge Mansmann which properly applied the standard in establishing the probative nature of the testimony:

> "Keeping in mind that 'smoking guns' are rarely available to the plaintiffs in employment discrimination cases, the evidence proffered at the first trial was clearly sufficient to establish the relevance of Parzick's testimony. Borden established that staff and management held weekly meetings to discuss layoffs. While he asserted that the plaintiffs' ages were not considered, he conceded recognition of the emotional impact of the plaintiffs' long years of service when deciding to terminate the plaintiffs.
>
> Borden also established that Nick Kulokoski, who allegedly stated 'Let's give it a try. What do we have to lose?', advised management regarding compliance with the collective bargaining agreement and discrimination laws. Further, a compartmentalized differentiation between Westinghouse's alleged disregard of the collective bargaining agreement and age discrimination laws ignores the fact that age and seniority often are related and that pensions accrue according to both age and the collective bargaining agreement.
>
> It was certainly for the jury to assess the credibility of Westinghouse's assertion that it never considered the financial implications of terminating groups of employees, specifically, relative savings in salary and pensions, which are tightly linked with age and seniority. Finally, even if one agrees with the majority that Parzick's testimony was not relevant to the plaintiffs' affirmative claim of age discrimination, it was undeniably relevant to challenge Westinghouse's defense that it could not have spread the reduction-in-force across the three engineering job progressions because the terms of the

> collective bargaining agreement precluded it from doing so. Because the plaintiffs could have met their burden by proving that Westinghouse's alleged business reasons were pretextual, Parzick's testimony was improperly excluded as irrelevant." *Bhaya v. Westinghouse Electric Corporation,* 922 F.2d at 193.

In the context of the present case, the statement of the defendant's Manager of Personnel was proffered in support of plaintiffs' claim that defendant knew it was violating the law as it related to the termination of older employees. The witness, plaintiff Parzick, clearly identified the declarant and sufficiently related the admission to a substantial matter in dispute, i.e., defendant's knowledge and intent at the time plaintiffs were discharged. While the majority opinion is correct that the statement as it deals with illegality could relate to other matters, it is equally apparent that no other matters were being discussed with Mr. Kinlin. Therefore, the jury could rationally connect the admission of unlawful behavior to a violation of the statute which was the subject of their determination. *See Mullen v. Princess Anne Volunteer Fire Co., Inc., supra,* at 1134; *United States v. Pugliese,* 153 F.2d 497 (2d Cir. 1945).

B. Exclusion Principles and Unfair Prejudice

Rule 403 of the Federal Rules of Evidence provides the primary basis upon which otherwise relevant testimony may be excluded:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

While Courts of Appeal must review a District Court's exclusion of evidence under Rule 403 with

substantial deference, a District Court will be found to abuse its discretion when its analysis is flawed. *Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34 (3d Cir. 1989). The District Court's decision does not have to be outlandish or malicious to be "clear abuse." Rather, the reviewing court must only find that a mistake has been made. *Petree v. Victor Fluid Power, Inc., supra; Hill v. Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817 (10th Cir. 1986).

Exclusion of evidence under Rule 403 is an extraordinary remedy. It is well- settled that trial courts should make only the most sparing use of a rule which excludes otherwise admissible evidence. *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985); *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), reh. denied 693 F.2d 135, cert. denied 460 U.S. 1083 (1982). Certainly, "probative value" must be "substantially outweighed" by the danger of misleading the jury or unfair prejudice.

As these standards apply to discrimination cases, the trial court is even more constrained to permit admission:

> "Jury trials are not antiseptic events, and in a case involving racial discrimination, upsetting facts may well emerge. The general policy of the Federal Rules, however, is that all relevant material should be laid before the jury as it engages in the truth-finding process. *See generally* 1 Weinstein's Evidence, *supra*, at 403-46 to 403-50. For this reason, in reviewing a decision under Rule 403, the court must 'look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.' *Koloda v. General Motors Parts Division,* 716 F.2d 373, 377 (6th Cir. 1983). We are mindful, of course, that the discretion of the district court in rulings under Rule 403 is very broad and that the Rule is not amenable to an appellate blueprint. *See, e.g., Estate of Larkins v. Farrell Lines, Inc.*, 806 F.2d 510, 515 (4th Cir.

> 1986). On the other hand, courts are obligated to use the power conferred by Rule 403 sparingly, and to remember that the Federal Rules favor placing even the nastier side of human nature before the jury if to do so would aid its search for truth." *Mullen v. Princess Anne Volunteer Fire Co., Inc., supra,* at 1135.

See also *Davidson Oil Country Supply v. Klockner, Inc.,* 908 F.2d 1238, 1245-46 (5th Cir. 1990); *Allen v. County of Montgomery, Ala.,* 788 F.2d 1485, 1488 (11th Cir. 1986); *Koloda v. General Motors Parts Div., General Motors Corp.,* 716 F.2d 373, 378 (6th Cir. 1983).

In a situation parallel to the present case, the Court of Appeals for the Eighth Circuit reversed a jury's verdict in favor of an employer in an age case because the exclusion of evidence of a climate of race and age discrimination at defendant's dealership had "significantly handicapped plaintiff in persuading the jury of the likelihood of discriminatory animus." *Estes v. Dick Smith Ford, Inc.,* 856 F.2d 1097, 1102 (8th Cir. 1988). Bearing in mind that a trial court's exclusion of evidence under Rule 403 is entitled to substantial deference, the Court there noted that "the Court's exercise of its discretion must not unfairly prevent a party from proving his case." *Id.,* at 1103. The Court went on to note that:

> "Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices – evidence which in other kinds of cases may well unfairly prejudice a jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive." *Id.*, at 1103.

In the present case, the majority of the panel of the Third Circuit concluded that "the trial judge had solid

grounds for concluding that the out-of-court statements at issue had little if any relevance or probative value and that they created a substantial danger of 'unfair prejudice,' 'confusion of the issues,' and 'misleading the jurors.' " *Bhaya v. Westinghouse Electric Corporation,* 922 F.2d at 187. It is suggested that the Court applied principles of admission not condoned by the controlling law of this Court.

Citing only the Advisory Committee Notes on Rule 403, the majority rested its holding on the definition of "unfair prejudice" as an "undue tendency to suggest a decision on an improper basis" *Bhaya v. Westinghouse Electric Corporation,* 922 F.2d at 188. The majority opinion compounded improper reliance on this rather obscure test by analogizing the current circumstances to situations under Rule 404 of the Federal Rules of Evidence where the jury might be misled by a desire to punish for other wrongs. *Bhaya v. Westinghouse Electric Corporation,* 922 F.2d at 188.

Certainly, it is well-established (and properly set forth by Judge Mansmann in her dissent) that simple prejudice to the non-offering party's cause is not enough:

> "To be excluded under Rule 403, evidence must be *unfairly* prejudicial; mere prejudice cannot suffice because 'virtually all evidence is prejudicial or it isn't material.' *Carter v. Hewitt,* 617 F.2d 961, 972 n. 14 (3d Cir. 1980).
>
> * * *
>
> The declarant's statement mentioned 'violating . . . the labor laws of their contract' or 'doing something illegal or against the contract.' Even if the illegality referred to age discrimination and not the collective bargaining agreement, the district court found the statement substantially prejudicial because the jury may have viewed Westinghouse managers as a 'lawless bunch.'

> But Westinghouse itself proffered the defense that it never considered plaintiffs' ages and at all times conformed to the terms and restrictions of the collective bargaining agreement. So it was certainly material to Westinghouse's defense that it at all times tried to conform to the collective bargaining agreement. Given that Westinghouse repeatedly emphasized such efforts to conform to the collective bargaining agreement, the plaintiffs' one bit of evidence that Westinghouse may not have so scrupulously concerned itself with the collective bargaining agreement cannot be said to violate the *Carter* standard." *Bhaya v. Westinghouse Electric Corporation,* 922 F.2d at 193-94.

All relevant evidence is "prejudicial" in the sense that it may prejudice the party against whom it is admitted. Rule 403, however, is concerned only with "unfair" prejudice. That is, the possibility that the evidence will excite the jury to make a decision on the basis of a factor unrelated to the issues properly before it. See *Pine Crest Preparatory School, Inc. v. Phelan*, 557 F.2d 407, 409 (4th Cir. 1977); 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶403[03] (1986).

In summary, the unsupported conclusions of the Third Circuit required adherence to standards not adopted by this Court or recognized in any other jurisdiction. The majority's point-by-point analysis of "unfair prejudice," "confusion of the issues" or "misleading the jury" [*Bhaya v. Westinghouse Electric Corporation,* 922 F.2d at 188-89] is bottomed entirely on its improper reliance on a specificity of reference test which heretofore has been universally rejected. *Carter v. Hewitt*, 617 F.2d 961 (3d Cir. 1980); *United States v. Day*, 591 F.2d 861, 878 (D.C. Cir. 1978).

II. THE SUPREME COURT OF THE UNITED STATES HAS NOT ADOPTED A CONTROLLING "HARMLESS ERROR" RULE FOR CIVIL CASES AND THERE IS SUBSTANTIAL CONFLICT AMONG THE CIRCUITS.

Once an appellate court has reached a decision that the judge in the court below has erred, the Court must then decide whether that error was harmless, i.e., did it make a difference to the outcome of the case? Such decisions in regard to harmless error are vitally important in the American system of jurisprudence:

> "A determination that an error was harmless is an extremely weighty conclusion; it implicates profound notions of fairness and justice." *United States v. Lane*, 474 U.S. 438, 478 (1986) (Stevens, J. concurring and dissenting).

It is without reservation one of the most significant tasks an appellate court must undertake.

A Court's power in this regard derives from three sources, all of which hinge the Court's determination on "substantial justice" and the "substantial rights" of the parties. Rule 61 of the Federal Rules of Civil Procedure sets forth the parameters of the trial court's decision:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The Federal Rules of Evidence also direct the trial court in making evidentiary rulings:

> "Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." FRE 103(a).

And the provisions of 28 U.S.C. §2111 also give rise to the appellate court's authority:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

In 1946, this Court first carefully reviewed the controlling statute and its restatement in the federal rules of procedure (civil and criminal) and resolved that, in a complex criminal conspiracy trial where it was "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict," the convictions had to be reversed. *Kotteakos v. United States,* 328 U.S. 750, 776 (1946) stating that if a court

> "is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . but if one cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude substantial rights were not affected." *Id.*, at 764-65.

The Court did not, however, define a standard to be used in all cases, both criminal and civil:

> "The statute in terms makes no distinction between civil and criminal causes. But this does not mean that the same criteria shall always be applied regardless of this difference.
>
> * * *

It did not require the same judgment in such a case as in one involving only some question of civil liability." *Id.*, at 762-63.

Since that time, each Court of Appeals examining the issue of non-Constitutional harmless error in civil cases has defined its own test. The Courts of the Third, Fifth and Eleventh Circuits have chosen to adopt a criminal standard similar to that in *Kotteakos*, while those of the Seventh, Eighth, Ninth and Tenth Circuits have formulated "more probable than not" standards which parallel the preponderance of the evidence test in civil cases. It is suggested that the Third Circuit's adoption of a criminal standard of harmless error in civil cases is improper and contrary to the directives in *Kotteakos*. In view of this circumstance and the vacuum created by this Court's silence heretofore on the issue, it is urged that this Court adopt the civil standard chosen by the Seventh, Eighth, Ninth and Tenth Circuits and reverse the decision in this case. The following review of the present status of the law fully supports this request.

In *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 917 (3d Cir. 1985), the Third Circuit Court of Appeals examined the question of what standard of review a court should use in analyzing claims of non-Constitutional harmless error in civil suits and held that "a court can find that such errors are harmless only if it is highly probable that the errors did not affect the outcome of the case." In so ruling, that Court made the conscious decision to use the harmless error standard used by it in criminal cases – "errors in a criminal case are not harmless unless it is highly probable that they did not affect a party's substantial rights." *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). The Eleventh and Fifth Circuits agree that the criminal harmless error standard should apply, though they use the *Kotteakos* standard. *Aetna Cas. and Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986);

Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927, 929 (5th Cir. 1976).

The Ninth Circuit in the often-cited case of *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983) presented the most cogent argument for the adoption of a clear and reduced civil standard:

> "[A] crucial first step in determining how we should gauge the probability that an error was harmless is recognizing the distinction between civil and criminal trials . . . This distinction has two facets, each of which reflects the differing burdens of proof in civil and criminal cases. First, the lower burden of proof in civil cases implies a larger margin of errors. The danger of the harmless error doctrine is that an appellate court may usurp the jury's function, by merely deleting improper evidence from the record and assessing the sufficiency of the evidence to support the verdict below . . . This danger has less practical importance where, as in most civil cases, the jury verdict merely rests on a more probable than not standard of proof.
>
> The second facet of the distinction between errors in civil and criminal trials involves the differing degrees of certainty owed to civil and criminal litigants. Whereas a criminal defendant must be found guilty beyond a reasonable doubt, a civil litigant merely has a right to a jury verdict that more probably than not corresponds to the truth.
>
> The civil litigant's lessened entitlement to veracity continues when the litigant becomes an appellant. We conclude that a proper harmless error standard for civil cases should reflect the burden of proof. Just as the verdict in a civil case need only be more probably than not true, so an error in a civil trial need only be more probably than not harmless . . . In other words, when an appellate court ponders the probable effect of an error on a civil trial, it need only

> find that the jury's verdict is more probably than not untainted by the error." *Id.*, at 1459.

See also *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 (10th Cir. 1988) ("where the verdict more probably than not was untainted by the error, the error is harmless and a new trial is not required."); *McIlroy v. Dittmer*, 732 F.2d 98, 105 (8th Cir. 1984) (adopting the *Haddad* standard of the Ninth Circuit); *Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (7th Cir. 1985) (the error in the jury instructions of the court below "[did] not warrant a new trial since a review of the record at trial reveal[ed] that the jury would not in all probability interpret [the instruction] as relieving [defendant] of its duty [to the plaintiff].").

The failure of this Court to adopt a civil harmless error standard has not gone unnoticed by legal commentators as well. In a compelling 1973 article, Professor Stephen A. Saltzburg has urged that the same harmless error standard not be used for both criminal and civil cases, and lamented that this Court has yet to resolve the conflict in the Circuits:

> " . . . it is indeed unfortunate that the Supreme Court has not seen fit to exercise its supervisory powers to insure the statute's uniform application." Saltzburg, "The Harm of Harmless Error," 59 Va.L.Rev. 988, 1010 (1973).

Plaintiffs herein also urge the adoption of an appropriate civil harmless error standard and the necessary conclusion that no *harmful* error exists in this case under such a test.

CONCLUSION

It is clear from the foregoing discussion that the trial court and the majority of the panel of the Third Circuit Court of Appeals have given birth to an unprecedented specific reference standard to be used in determining whether evidence is relevant and whether, if relevant,

that evidence is prejudicial. Such a standard, as it applies to discrimination cases, violates this Court's mandates as contained in *Burdine* and *Aikens* and will prevent plaintiffs who prosecute claims under the Age Discrimination in Employment Act from proving their case through the use of circumstantial as opposed to direct evidence of unlawful motive and discriminatory intent. This Court cannot allow this restrictive standard to control future cases in the Third Circuit and influence other courts effectively to ignore the holdings in *Burdine* and *Aikens*.

Of at least equal importance to the unfettered supervisory responsibility of this Court is the application by the Third, Fifth and Eleventh Circuit Courts of Appeals of the "harmless error" standard for criminal cases in civil matters. This minority view (the Seventh, Eighth, Ninth and Tenth Circuits apply a "more-probable-than-not" civil test) is contrary to the directives of this Court in *Kotteakos v. U.S.* and will, if not corrected, result in ever increasing demands on the appellate process through more appeals engendered by a criminal law standard which improperly restricts error from being deemed "harmless" in a civil case. The circumstances so presented demand the guidance of this Court and the imposition of a universal civil harmless error standard.

Plaintiffs therefore request that this Court grant their petition for a writ of certiorari and permit a full resolution of the issues presented herein.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAL R. BHAYA,	:	CIVIL ACTION
RICHARD CARNER,	:	
WILLIAM J. HAESSLER,	:	
HENRY A. PARZICK, and	:	
EARLE WILLIAMS	:	
v.	:	
WESTINGHOUSE ELECTRIC	:	
CORPORATION	:	NO. 84-5381

OPINION

Lord, S.J. December 30, 1986

Defendant in this age discrimination case moves for judgment notwithstanding the verdict or, in the alternative, for a new trial. It contends that there was insufficient evidence to support a jury verdict finding it liable to plaintiffs under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and finding plaintiffs entitled to back pay, front pay and liquidated damages. Defendant also contends that it should be given a new trial because of trial error. For the reasons that follow, I will grant defendant's motion for judgment notwithstanding the verdict as to liability, and therefore do not reach the other issues that defendant raises.

I.

Before their layoff, plaintiffs Lal Bhaya, Henry Parzick, William Haessler, Earle Williams and Richard Carner were employed as negotiation engineers in the Combustion Turbine Systems Division at defendant's facility in Concordville, Pennsylvania. The business of that division, insofar as it is relevant, was selling new gas turbines and repairing old ones, as well as selling upgrades, maintenance programs and replacement parts for them. In November, 1982, as part of a reduction in

force necessitated by poor economic conditions in the turbine generator industry, defendant eliminated the negotiation engineer position. Under the collective bargaining agreement then in effect, plaintiffs did not have the right to bump employees from other job progressions. Consequently, they were laid off on December 17, 1982. At that time, plaintiffs' ages ranged from fifty-four to sixty-two, and their tenure at Westinghouse ranged from sixteen to thirty-nine years.

Plaintiffs do not dispute that, once their position was eliminated, the collective bargaining agreement controlled whether they could bump other employees, and thus they do not contend that their inability to do so was impermissibly related to their ages. Nor do plaintiffs dispute that economic conditions necessitated a reduction in force at defendant's Concordville facility. Their claim is that age was a determining factor in defendant's decision to implement the reduction in force by, *inter alia,* eliminating the position of negotiation engineer.

II.

In 1982, negotiation engineer was one of nine job progressions of salaried employees covered by the collective bargaining agreement at the Concordville facility. Plaintiffs tried their case on the theory that, because of their age, they were treated less favorably than the engineers in two other job progressions: in Bhaya's case, applications engineer,[1] and in the case of the other four plaintiffs, availability assurance engineer. Although defendant laid off less senior engineers in those two job progressions, it did not entirely eliminate either one,

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1. Nothing in the record shows that applications engineer was a job progression at defendant's Concordville facility. As best as I can tell, applications engineer is a designation given by Bhaya and plaintiffs' counsel to certain engineers within the general engineer job progression. However, it is virtually impossible to ascertain from Bhaya's testimony what he deems the distinguishing characteristics of that group.

and, as of the date plaintiffs were laid off, the more senior engineers in those job progressions remained employed at Westinghouse.

Plaintiffs adduced the following evidence in support of their claim. Parzick, Haessler, Williams and Carner testified that they were older[2] and had more seniority than the availability assurance engineers. Each testified that, after the availability assurance engineer job progression was created in 1977 or 1978, availability assurance engineers took over some of his work.[3] Each also testified that, at the time of his layoff in 1982, he had the ability to do the work then being done by the availability assurance engineers.

Bhaya testified that he was older than all of the applications engineers[4] and more senior than some. He also testified that, at the time of his layoff in 1982, he was capable of doing the work then being done by applications engineers.

Each plaintiff testified as to his job duties as a negotiation engineer. Parzick testified that he dealt with customers and the Westinghouse sales office regarding the sale of renewal and replacement parts, as well as modifications, for customer-owned Westinghouse turbines. Haessler testified that his responsibility was to sell

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2. According to calculations made by plaintiffs' attorney, which he said were based on plaintiffs' Exhibit No. 8, the average age of negotiation engineers employed at Westinghouse in mid-1982 was 48.9, while the average age of availability assurance engineers was 35.8.

3. Plaintiffs claim age discrimination only as to their layoff, not as to the creation of the availability assurance engineer job progression in 1977 or 1978. As I understand it, plaintiffs offered this evidence to prove that because they had at one time, *i.e.*, before the creation of the availability assurance engineer job progression and transfer to those engineers of some of the negotiation engineers' duties, done the availability assurance engineers' work, they were capable of doing that work in 1982.

4. According to calculations made by plaintiffs' attorney, *see supra* note 2, the average age in mid-1982 of the general engineers, *see supra,* note 1, was 41.8.

parts and repair service for gas turbines and to negotiate settlements as to who would pay for what. Williams testified that he prepared proposals on gas turbine components, stocking programs, product modifications and upgrades. Bhaya testified that he prepared proposals for the marketing department. Finally, Carner testified that, until 1980, he created parts catalogs, and that, thereafter, he worked on developing a training program to teach foreign students how to operate the gas turbines in their native countries.

Plaintiffs also compared the negotiation engineer position to that of the availability assurance or applications engineer. However, the evidence presented by plaintiffs on this point was fraught with contradictions. Williams testified that, in 1982, his job was essentially the same as that of the availability assurance engineers. He also testified, however, that there was a distinction, the nature of which he did not identify, between the two jobs. Carner testified that there was no difference, in 1982, between his job duties and the job duties of availability assurance engineers. On cross-examination, however, he testified that he supposed that there was a significant difference between his job duties and the job that the availability assurance engineers were doing. Bhaya testified that he did not know what the duties of the applications engineers were, but that at times, the frequency of which he did not identify, he did the exact same thing as the applications engineers. Parzick testified that, in 1982, he was doing basically the same job as the availability assurance engineers, but also testified that it was the availability assurance engineers' job to be the technical liaison between the negotiation and the other engineers. Haessler testified that, in 1982, there was a difference, although not a significant one, between his job and the job of availability assurance engineer. He testified that his job involved developing costs, selling prices and quotation letters, while the availability assurance engineers did the technical liaison work that he had done before 1978.

Plaintiffs placed into evidence the job descriptions for senior and advanced negotiation engineer and senior and advanced availability assuranc engineer. Parzick testified that the availability assurance engineer descriptions accurately represented the duties he had observed those engineers performing from 1978 through 1982. The negotiation engineer descriptions stated that the primary function of that job was to develop proposals for contract negotiations and to follow up on contract awards. The assigned responsibilities focused on developing proposals and sales strategy, and on contract management. The primary function of availability assurance engineers, according to the job descriptions, was to assume responsibility for availability assurance.[5] The assigned responsibilities focused on managing outages on Westinghouse turbines in the field. Plaintiffs did not offer a job description for the applications engineer job.

Plaintiffs' expert testified that he had reviewed the job descriptions for negotiation and availability assurance engineers, and from those descriptions had concluded that the responsibilities and requirements for the two jobs were very similar. However, he did not elaborate as to what specific similarities he found. Moreover, he testified on cross-examination that the job descriptions were not the same and that the jobs required different skills and potentially different training. In addition, plaintiff's attorney conceded that there was nothing in the senior negotiation engineer job description regarding the management of outages on Westinghouse equipment,[6] which was the predominant responsibility enumerated in the job descriptions for availability assurance engineers.

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5. As explained by one of defendant's witnesses, availability refers to the percentage of time equipment in the field, *i.e.*, equipment being used by customers, is available to operate.

6. Likewise, it is apparent that there was nothing in the advanced negotiation engineer job description regarding the management of outages.

Each plaintiff also testified as to what happened to his work when he was laid off. Parzick testified that his supervisor told him to turn over his current work to the three availability assurance engineers with whom he worked on international projects. Haessler testified that after he left his work was done by an availability assurance engineer named DiTella, who was five years younger than he, and by one of the sales managers. He testified that he had no idea whether availability assurance engineers other than DiTella did his work after he left. Williams testified that he was told to turn his work over to a sales manager, a marketing employee and an availability assurance engineer. Carner testified that, as far as he knew, two availability assurance engineers took over his job: DiTella, who, according to one of plaintiffs' exhibits, was four years younger than Carner, and Beach, who was seven years Carner's junior. Bhaya testified that he was told that his work was going to be taken over by applications engineers and management, but that he did not actually know who did his work after he left.

Plaintiffs introduced the testimony of an expert in industrial management and statistics. He testified to the following. In the overall reduction in force at defendant's Concordville facility, he concluded that there was "equity on balance" in the numbers of employees[7] over and under the age of forty who were discharged. However, he found significance in the fact that the percentage of negotiation engineers in the group of employeed who were terminated was four times greater than their percentage, before the reduction in force, in the work force as a whole.

This led him to compare negotiation engineer to other job progressions that he characterized as related. He compared the rate at which negotiation engineers over forty were laid off to the rate at which availability

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7. The employees plaintiffs' expert looked at were salaried employees covered by the collective bargaining agreement.

assurance engineers over forty were laid off. He found that negotiation engineers over forty were discharged at a higher rate than availability assurance engineers over forty, and found that difference to be statistically significant. From that, he concluded that age was a strong and determining factor in eliminating the negotiation engineers. He also found that negotiation engineers over forty were discharged at a higher rate than general engineers over forty. Again, that led him to conclude that age was a determining factor in the elimination of the negotiation engineer position.[8] However, on cross-examination, he conceded that, in the negotiation, availability assurance and general engineer job progressions, whether considered individually or in total, one's chances of being laid off were greater if one was younger than if one was older.

In addition, plaintiffs' expert opined that, assuming that the job responsibilities of negotiation and availability assurance engineers were in fact similar, the proper method of reducing defendant's work force was by terminating the least senior employees and retaining the more senior ones, regardless of the job progression in which they worked, because this would recognize the fact that the negotiation engineers were qualified to perform the availability assurance engineers' functions. He also testified that, in terms of pensions and other benefits, it was financially beneficial for defendant to discharge older rather than younger employees. However, on cross-examination, he testified that at least some of the premises for this conclusion were speculative.

Finally, Parzick testified as to a conversation he had with Thomas Kinlin, his immediate supervisor, on the day that he was informed that he would be laid off.

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8. I realize that these comparisons and the conclusions plaintiffs' expert drew from them are so obviously nonsensical that the reader of this opinion may think that I am misstating his testimony. I am not.

Parzick testified that Kinlin told him that at an executive meeting at which Kinlin was present, the negotiation engineers' termination was discussed, and "[a] statement was made that maybe we shouldn't be eliminating this group. Maybe we're doing something illegal or against the contract, and Mr. Nick Kulokoski, who was the personnel manager of the division, said, let's give it a try. What do we have to lose?"

III.

In considering defendant's motion for judgment notwithstanding the verdict, I must view the evidence in the light most favorable to plaintiffs. Therefore, I will not review defendant's evidence insofar as it controverted evidence offered by plaintiffs, because for purposes of this motion all disputed questions of fact must be resolved in plaintiffs' favor.

It is essential, however, to consider defendant's evidence insofar as it was offered to meet defendant's burden of articulating a legitimate, nondiscriminatory reason for its decision to eliminate the negotiation engineer job progression. As to this issue, James Borden, who in June, 1982 was acting manager of the availability assurance department, testified to the following.

As of June, 1982, business had declined drastically. There had been no new apparatus orders, and service sales were well below the forecast level. Management decided that, in order to survive in the shrinking market, it would be necessary to reorganize the business. After a general reduction in force in the summer of 1982, Borden and other managers assessed which job functions could be eliminated with the least deleterious business effect.

Borden and Mr. McIntyre, who managed the marketing department, both determined that one of the job progressions that could be eliminated was negotiation engineer. The reason, according to Borden, was that the

negotiation engineers' function was to support the regional sales managers. They did that by gathering information as to pricing, material availability and technical matters from various functional groups, and putting together proposals. Borden felt that, although the sales managers might be inconvenienced, they could continue to get sales without that type of support.

Borden also testified that he did not consider eliminating the availability assurance engineers because of the importance of that function to Westinghouse customers. He testified that, after the availability assurance engineer job progression was created in 1978, availability improved by 20%, and customer satisfaction improved also.

Finally, Borden testified as to how the business functioned after the negotiation engineer job progression was eliminated. He testified that management reinstituted a procedure called a service negotiation estimate, whereby the customer order department would provide routine information on pricing and availability of parts, getting assistance as necessary from the appropriate technical group, such as the availability assurance engineers. He further testified that the sales managers assumed responsibility for all additional information gathering and for preparing proposals and quotations.

In response to plaintiffs' claim that they could have been retained and done the availability assurance engineers' work, defendant introduced the testimony of Chester Turnbull. In 1982, Turnbull was responsible for overseeing compliance with the salaried employees' collective bargaining agreement. Turnbull testified that, under the collective bargaining agreement, duties could be transferred from one job progression to another only if the transfer did not necessitate a revision of the job descriptions. If a revision was required to effect the transfer, the union had to be notified and given an opportunity to bargain with management. If an agreement was not reached, the union could grieve the

transfer. Turnbull testified that, in his opinion, the availability assurance engineers' job duties could not have been transferred to the negotiation engineers, because such a transfer would have necessitated revising the job descriptions, something which, if done during a reduction in force, would lead to grievances and subject the union and the company to charges of unfair labor practices.

IV.

The question I must decide is whether, viewing all the evidence in the light most favorable to plaintiffs, they sustained their ultimate burden of showing that age was a determining factor in defendant's elimination of the negotiation engineer position.[9] *See Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 654 (3d Cir. 1986); *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 257 (3d Cir. 1986). Plaintiffs assert that they met this burden both with affirmative evidence and by demonstrating the lack of credibility in the reason given by defendant for the elimination of their position.

I find no affirmative evidence which even begins to sustain plaintiffs' burden of proof. Although plaintiffs' evidence shows that the negotiation engineers were, on average, older than the availability assurance and general engineers,[10] and were treated more favorably, this

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9. This was the question that the jury answered in the affirmative. At the points for charge conference, the parties agreed that this question correctly stated the theory on which plaintiffs tried their case.

10. Defendant argues that the availability assurance engineers who plaintiffs Haessler and Carner claimed took over their jobs were only four to seven years younger than those plaintiffs, thereby precluding a finding that age was a determining factor in the elimination of those plaintiffs' positions. Because I conclude that, even assuming that each plaintiff may rely on the fact that, on average, the availability assurance engineers were younger than the negotiation engineers, there was insufficient evidence to support the jury's verdict, I need not address this issue.

cannot, without more, give rise to an inference of age discrimination in light of defendant's articulation of a legitimate, nondiscriminatory reason for its decision to eliminate the negotiation engineer job progression. The only other affirmative evidence offered by plaintiffs was Parzick's testimony as to his conversation with Kinlin. However, assuming for purposes of this motion that I properly admitted that testimony,[11] I conclude that it simply does not show, directly or by inference, that age was a determining factor in defendant's decision. Plaintiffs adduced no evidence showing that either the unidentified speaker or Kulokoski had anything to do with the decision to eliminate plaintiffs' position. To infer either from the ambiguous statement[12] by the unidentified speaker or from Kulokoski's response that age was a determining factor in Borden's or McIntyre's decision-making would be impermissibly speculative.

Neither do I find any evidence directly impugning the nondiscriminatory reason articulated by defendant for its decision to eliminate the negotiation engineer position. Plaintiffs presented no evidence refuting the reasons that Borden gave for his determination that the job was one which could be eliminated without serious adverse affect on the business. Plaintiffs' own testimony as to their job duties supports Borden's characterization of their function as supporting sales. Plaintiffs did not argue, let alone submit evidence to show, that the function of coordinating information could not be taken over by the regional sales managers. Nor did plaintiffs

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11. Defendant argues vigorously that that testimony was not admissible as nonhearsay and that its admission was highly prejudicial. In their brief, plaintiffs argue that Kinlin's and Kulokoski's statements were admissible, but do not address the question of the admissibility of the statement by the unidentified declarant.

12. Defendant argues that this statement clearly refers to whether defendant's actions were permissible under the collective bargaining agreement, while plaintiffs argue that it refers to age discrimination. Both read far more into the statement than logic or the evidence allows.

refute Borden's testimony as to what actually occurred to their function once the job progression was eliminated. Although plaintiffs identified the individuals to whom they turned over their current work when they left, none testified as to whether or not the responsibility for their job function was actually assumed by the sales managers. Finally, plaintiffs presented no evidence contradicting Borden's testimony as to the importance of retaining the availability assurance engineers' functions.

In the absence of affirmative evidence of discrimination or direct evidence impugning defendant's position, plaintiffs' case rests upon their argument that defendant's reason for eliminating their job progression was pretextual because plaintiffs were qualified to stay at Westinghouse and accept job tasks from younger and less senior employees.[13] This argument fails for two reasons.

First, as a logical matter, that plaintiffs were qualified to do jobs other than the one they held does not show that defendant's reason for eliminating the negotiation engineer position was pretextual. Plaintiffs cite no cases, and I am aware of none, holding that a defendant's failure to devise a way to retain older employees and lay off younger ones during a reduction in force is a violation of ADEA. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) (an employer is not required to adopt the policy that will maximize the number of older persons in its work force).

Second, plaintiffs' evidence, no matter how liberally construed, does not support plaintiffs' contention that all or even most of the job duties of the availability assurance and applications engineers could have been transferred to the negotiation engineers. Plaintiffs argue that

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13. Plaintiffs concede that they could not, under the collective bargaining agreement, have been given the position of availability assurance or applications engineer. Their argument is that they should have been kept in the negotiation engineer position and given the duties of employees in other job progressions.

their evidence established that the job duties of the negotiation, availability assurance and applications engineers were similar, and therefore that the job duties could have been interchanged without union bargaining. However, plaintiffs' evidence as to the similarity of job functions was hopelessly vague and contradictory. *See supra* pp. 5-7. The only conclusion that can reasonably be drawn from plaintiffs' evidence is that there was some degree of similarity, and perhaps some overlap, in job duties. It is impossible, though, to draw any conclusion as to specific areas of similarity or overlap. To infer from plaintiffs' evidence that they could have been given duties such as managing outages on Westinghouse equipment in the field, without necessitating a change in their job descriptions, would be pure speculation. Moreover, no such inference can be drawn from the testimony as to the distribution of the negotiation engineer job duties to other engineers when plaintiffs were laid off, because plaintiffs did not introduce a shred of evidence as to whether other engineers were given duties that would have necessitated a change in their job descriptions.[14]

Plaintiffs' remaining arguments are specious. They argue that Borden's testimony was not credible because he produced no documentary evidence supporting his determination that the negotiation engineer position could be eliminated without serious adverse effect on the business. However, plaintiffs submitted no evidence as to whether records were regularly kept by defendant regarding this type of decision. Moreover, plaintiffs adduced no evidence showing that a study was necessary or would even have been helpful in determining which job functions could be eliminated to effect the reduction in force.

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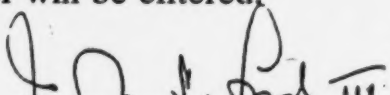
14. For example, there is no evidence in the record that availability assurance or applications engineers, rather than sales managers, assumed the responsibility for developing sales proposals or following up on contract awards.

Further, any reliance by plaintiffs on the testimony of their expert as evidence upon which the jury could reasonably have based its verdict is misplaced. It is utterly ridiculous to draw a conclusion about age discrimination by comparing the rates of termination of three groups of employees over forty. It is elementary that to be able to draw any conclusion as to whether age correlates with rates of termination, one must compare groups of older and younger employees. The expert's testimony that it was financially beneficial for defendant to lay off older workers cannot be given any weight, as he admitted that at least some of the premises underlying his conclusion were speculative.

Finally, at oral argument on defendant's motion and in his closing speech to the jury, plaintiffs' attorney seized upon a statement made by Borden that "there is some opinion by industry experts that the turbine generator business might come back in this century." The attorney argued that, from this statement, one could reasonably infer that Borden, when planning how to reduce defendant's work force, decided to lay off plaintiffs because, being older, they would not be working when the business turned around in the year 2000. This type of rank speculation is obviously impermissible, and certainly cannot support the jury's verdict.

Having reviewed all the testimony and exhibits and having considered all of plaintiffs' arguments to the contrary, I conclude that plaintiffs did not submit the minimum quantum of evidence from which the jury reasonably could have found that plaintiffs sustained their burden of proving intentional age discrimination. Accordingly, I will grant defendant's motion for judgment notwithstanding the verdict.

An appropriate order will be entered.



Joseph S. Lord, III *S.J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAL R. BHAYA,	:	CIVIL ACTION
RICHARD CARNER,	:	
WILLIAM J. HAESSLER,	:	
HENRY A. PARZICK, and	:	
EARLE WILLIAMS	:	
v.	:	
WESTINGHOUSE ELECTRIC	:	
CORPORATION	:	NO. 84-5381

ORDER

AND NOW, this 30th day of December, 1986, it is ORDERED that defendant's motion for judgment notwithstanding the verdict is GRANTED. The judgment dated December 20, 1985 and entered December 23, 1985 is VACATED, and judgment is ENTERED IN FAVOR OF DEFENDANT and AGAINST PLAINTIFFS.

BY THE COURT:

Joseph S. Lord, III *S.J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAL R. BHAYA,	:	CIVIL ACTION
RICHARD CARNER,	:	
WILLIAM J. HAESSLER,	:	
HENRY A. PARZICK, and	:	
EARLE WILLIAMS	:	
v.	:	
WESTINGHOUSE ELECTRIC	:	
CORPORATION	:	NO. 84-5381

ORDER

AND NOW, this 30th day of December, 1986, it is ORDERED that defendant's motion to amend the judgment, plaintiffs' motion to strike defendant's motion to amend the judgment, and defendant's motion to vacate the judgment are DENIED AS MOOT.

BY THE COURT:

Joseph S. Lord, III *S.J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAL R. BHAYA,	:	CIVIL ACTION
RICHARD CARNER,	:	
WILLIAM J. HAESSLER,	:	
HENRY A. PARZICK, and	:	
EARLE WILLIAMS	:	
v.	:	
WESTINGHOUSE ELECTRIC	:	
CORPORATION	:	NO. 84-5381

ORDER

AND NOW, this 5th day of January, 1987, it is ORDERED that the opinion filed on December 30, 1986 is AMENDED AS FOLLOWS:

1. On page 14, line 2, the word "more" is changed to "less."

2. On page 15, line 10, the word "affect" is changed to "effect."

BY THE COURT:

Joseph S. Lord, III *S.J.*

Ordered: Jan. 6, 1987
CLERK OF COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1026

BHAYA, LAL R. and CARNER, RICHARD and
HAESSLER, WILLIAM J. and PARZICK, HENRY A.
and WILLIAMS, EARLE,
Appellants

vs.

WESTINGHOUSE ELECTRIC CORPORATION

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 84-5381)

Argued
August 4, 1987
Before: SEITZ, MANSMANN and
GREENBERG, *Circuit Judges*.

(Filed November 2, 1987)

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Counsel for Appellee

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

This is an appeal from the district court's entry of judgment for the defendant employer under Fed. R. Civ. P. 50(b) notwithstanding the jury verdict for the plaintiffs in this action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* We have jurisdiction under 28 U.S.C. § 1291 to review the final order of the district court. When deciding a motion for judgment notwithstanding the verdict, the trial judge must determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253 (3d Cir. 1986). Our review of the application of this standard is plenary. *Id.* We find that the district court erred in failing to afford the plaintiffs the benefit of all reasonable inferences to be drawn from the evidence. Consequently we will vacate the order of the district court and remand for reinstatement of the jury verdict in favor of the plaintiffs.

I.

The plaintiffs are five engineers who were laid off or retired on December 17, 1982 when the defendant Westinghouse Corporation eliminated the job progression of Negotiation Engineer. The plaintiffs were the only employees in that job progression and, at the time of their terminations, they ranged in age from

54 to 62 and had between 16 and 39 years of service with Westinghouse.[1] The parties agree that economic conditions necessitated a reduction in force. They also agree that, under the collective bargaining agreement which governs their relationship, the plaintiffs were not eligible to "bump" employees in other job progressions.

The plaintiffs filed this action claiming that, in effectuating the necessary force reduction, the defendants discriminated against the plaintiffs because of their age. The district court had subject matter jurisdiction under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.*, ("ADEA").

The plaintiffs claimed that the defendants eliminated the plaintiffs' job progression because the engineers in that category were older than engineers in two other salaried job progressions -- namely "Availability Assurance Engineer" and "Applications Engineer" -- which were not eliminated. The plaintiffs claimed that their duties were assumed by Availability Assurance Engineers and Applications Engineers, and that they are qualified to do the work performed by Availability Assurance Engineers and Applications Engineers. The plaintiffs asserted that the defendants could have maintained an adequate workforce by laying off engineers in all three progressions according to their seniority and transferring the duties of the other classifications to the older and more senior Negotiations Engineers. The plaintiffs' theory of recovery was that the jury could logically infer, from the defendant's failure to pursue this course of action, that

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1. Plaintiff Lal R. Bhaya was 58 years of age and had 16 years of service; Richard Carner was 54 and had 31 years of service; William J. Haessler was 55 and had 35 years of service; Henry A. Parzick was 62 and had 39 years of service, and Earle Williams was 59 with 33 years of service.

age was a factor in the defendant's decision to eliminate the plaintiffs' job progression.

At the close of the evidence, the defendants moved for a directed verdict. The motion was denied. The jury was instructed that it might find for the plaintiffs under the ADEA only if age was a determining factor in Westinghouse's selection of the job classification of negotiations engineer for elimination. When the jury returned a verdict for the plaintiffs, the defendants moved for a judgment n.o.v., because of the asserted insufficiency of the evidence or, in the alternative, for a new trial because of asserted trial errors.[2] Judgment n.o.v. was granted by the district court. Consequently, no action was taken on the Motion for a New Trial.

II.

A plaintiff may recover under the ADEA only if he proves by a preponderance of the evidence that age was a determining factor in the employer's decision. *Smithers v. Ballar*, 629 F.2d 892 (3d Cir. 1980). He may meet this burden with direct evidence, or when no direct evidence of intent is available, the employee plaintiff may have the benefit of a presumption of the employer's discriminatory intent by first establishing a prima facie case by circumstantial evidence. "This prima facie case is easily made out: a plaintiff alleging a discriminatory layoff need show only that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably." *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied* 464 U.S. 937 (1983).

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2. In addition to its claims regarding the sufficiency of the evidence, the defendant based its new trial motion on asserted errors involving, *e.g.*, admission and/or exclusion of certain evidence, jury instruction, and prejudicial comments in the presence of the jury.

As in any lawsuit, if the plaintiff fails to establish his prima facie case, the defendant may persuade the district court to dismiss the action. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983) ("*Aikens*"). If the plaintiff successfully proves its prima facie case, the defendant has the "burden of proof at this stage to meet [plaintiff's] prima facie case of discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) ("*McDonnell Douglas*"). To withstand a directed verdict, the defendant must "articulate some legitimate, nondiscriminatory reason" for its action, *id.* at 802, and must introduce evidence to prove that it acted for this reason. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The burden of production then shifts back to the plaintiff, because the ultimate burden to prove discriminatory animus remains with the plaintiff. *See e.g. Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.) *cert. denied*, 469 U.S. 1087 (1984); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) ("Burdine"). The plaintiff may meet this burden either through evidence presented in his case in chief or by way of rebuttal evidence.

The defendant in this case made no attempt to persuade the district court to dismiss the action for lack of a prima facie case. Instead, the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case. Therefore, whether the plaintiff actually did so is no longer relevant. *Aikens*, 460 U.S.at 715.

When the defendant responds to the plaintiff's proof by offering evidence of the reason for its treatment of the plaintiff, the factfinder is then in a position to decide the ultimate factual issue in the case. *Id.* The question facing the trier of fact at the close of the evidence in an employment discrimination

case is "whether the defendant intentionally discriminated against the plaintiff." *Id.* "In short, the [factfinder] must decide which party's explanation of the employer's motivation it believes." *Id.* at 716.

In this case, the plaintiffs assert that their job classification was selected for elimination by the defendant because of the age of the engineers remaining in that job classification. The defendant denies discrimination based on age, asserting that a reduction in force was necessitated by economic conditions and its elimination of the job category was based on a lack of need for the services being performed by negotiation engineers. Thus the issue at trial was framed by those opposing factual contentions. *See McDonnell*, 411 U.S. at 801.

The issue on this appeal is straightforward. The jury has told us which explanation it believes, and we are bound by that finding if there is evidence of record to support it. Our only inquiry is whether, taking the record as a whole and resolving all factual disputes in favor of the plaintiffs, the evidence and justifiable inferences therefrom reasonably support the plaintiffs' explanation. We turn now to consider whether a reasonable juror could have concluded that the defendant intentionally discriminated against the plaintiffs because of their age.

III.

Each plaintiff testified that when he was laid off or retired his remaining work was transferred to a younger engineer in another job progression, and that younger engineers were retained to perform work which the plaintiffs were qualified to perform. The plaintiffs also presented expert testimony of Richard Andrulis, Ph.D., who opined that the plaintiffs were qualified to perform the remaining tasks in other job progressions and that the tasks could have been

transferred without a change in plaintiffs' job description. Andrulis testified that statistical analysis had led him to the conclusion that there was "no question that age was a determining factor" in the decision to eliminate the plaintiffs' job progression.

The plaintiffs' expert testified that layoffs by seniority within each job family would have provided the defendants with a workforce capable of carrying out all tasks that were being performed at the time of the plaintiffs' termination. He testified that there was substantial financial benefit to Westinghouse in discharging older workers instead of younger ones. His statistical analysis showed that the class of engineers most dramatically affected by the layoffs in general were the Negotiation Engineers, who were substantially older as a group than the other engineering job families. Negotiation engineers, average age 48.9 years, were laid off at a 93.3% rate; Availability Assurance Engineers, average age 35.8 years, were laid off at a 29.4% rate.

The district court, in considering the defendant's motion for judgment n.o.v., stated that it would decline to consider whether the defendant's evidence controverted the plaintiffs' evidence inasmuch as, for purposes of a motion for judgment n.o.v., all disputed questions of fact must be resolved in the plaintiffs' favor. The district court found that the plaintiffs' evidence showed that the Negotiation Engineers were on average older than Availability Assurance and general engineers and were treated less favorably. Inexplicably, however, the district court then immediately proceeded to credit the defendant's evidence of a nondiscriminatory reason for its decision to eliminate the plaintiffs' job progression.

The employer's proffered reason for preferring one group of employees over another was that Westinghouse management determined that the

functions performed by the Negotiations Engineers were expendable without causing too much disruption of the normal operation of the business. Negotiations Engineers performed services for both the Marketing Department and the Availability Assurance Department,[3] and heads of both departments agreed that they could function without the services of the Negotiations Engineers who coordinated information which was available from other departments.

The defendant's evidence consisted exclusively of oral testimony regarding its reason for elimination of the job.[4] The reason was principally explained by James Borden, Manager of the Availability Assurance Department with responsibility for both Availability Engineers and Negotiation Engineers at the time the plaintiffs were terminated. Evidence regarding the collective bargaining agreement was provided by the oral testimony of witnesses Borden and Chester A. Turnbull, Manager of Salary Labor Relations and of Wage and Salary Administration at Westinghouse.

The defendant's witnesses testified that the job tasks could not have been transferred without engaging in collective bargaining unless assumption of those tasks would have required no revision of the plaintiffs' job description. The witnesses asserted that such a redescription would have been necessitated so that interchangeability was precluded except through collective bargaining.

In crediting the defendant's explanation, the district court effectively reversed the requirement that

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3. Plaintiff Bhaya was a Negotiations Engineer with the Marketing Department, while the other plaintiffs were Negotiations Engineers with the Availability Assurance Department.

4. The defendants apparently maintained no contemporaneous "paper trail" to evidence the course of business planning and decision-making leading to the effectuation of the reduction in force.

in reviewing a jury verdict we are to draw all inferences in favor of the prevailing party. The proof of this type of case is no different than any other, and there is no reason in an age discrimination case why testimony evidencing a reason *must* be credited by the factfinder.

We are reviewing a general verdict. It is impossible to tell whether the plaintiffs' evidence persuaded the jury that the employer considered age in addition to the relative expendability of the particular services being performed by the plaintiffs or whether the jury simply disbelieved the defendant's explanation for its action. If there is evidence to support either of these possible reasons for the verdict, the district court erred in granting judgment notwithstanding the verdict. Viewing the evidence in the light most favorable to the plaintiffs and drawing competing inferences in their favor, we find that the record contains indirect evidence which, if credited, raises an inference of discrimination.

The district court erroneously determined that the indirect evidence supporting the plaintiffs' prima facie case "cannot, without more, give rise to an inference of age discrimination in light of defendant's articulation of a legitimate, nondiscriminatory reason for its decision to eliminate the negotiation engineer job progression." The district court apparently thought that the defendant dispelled any inference of discrimination merely by introducing testimony of a legitimate reason for its actions.

Evaluation of witness credibility is the exclusive function of the jury, and where the only evidence of intent is oral testimony, a jury could always choose to discredit it. *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1234 (D.C. Cir. 1984). *See also Dreyer v. Arco Chemical Div. of Atl. Richfield*, 801 F.2d 651, 655-56 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1348 (1987).

The plaintiffs introduced evidence that (1) they belong to a protected class; (2) they were qualified for their positions; (3) they were dismissed despite being qualified; and (4) they ultimately were replaced by persons sufficiently younger to permit and inference of age discrimination. *See Chipollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 56 U.S.L.W. 3183 (U.S. Sept. 8, 1987) (No. 86-2007); *Maxfield v. Sinclair International*, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986). From this the jury can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on an illegal discriminatory criterion such as age. *Id.*

The district court also relied erroneously upon an asserted absence of evidence "directly impugning the nondiscriminatory reason articulated by defendant for its decision to eliminate the negotiation engineer position." The testimony of the plaintiffs' expert during their case in chief specifically takes issue with the defendant's assertions that the plaintiffs were not qualified to perform work still existing at Westinghouse. The expert also challenged the defendant's assertion that such work could not have been transferred to the plaintiffs as readily as the plaintiffs' work was transferred to engineers in other progressions.

The plaintiffs' evidence was adequate to support an inference, initially a presumption, of discrimination. When the defendant produced evidence of a nondiscriminatory reason, the *presumption* dropped from the case. A permissible *inference* remained, however, to create an issue of fact. In addition, the testimony of the plaintiffs' expert raised issues of fact with respect to the defendant's asserted reason.

Because we must resolve all factual issues in favor of the plaintiffs, we must assume that the factfinder did not believe the defendant. "When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for an employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as (age)." *Furnco Construction Corp. v. Waters*, 438 U.S. at 577 (emphasis in original). Therefore, the inferences from the plaintiffs' prima facie case, together with the testimony provided by the plaintiffs' expert which rebuts the proffered explanation by the defendant, may support a verdict in their behalf.

IV.

We find that, in considering the defendant's motion for judgment notwithstanding the verdict, the district court failed to give the plaintiffs the benefit of all reasonable inferences to be drawn from the evidence. Therefore we will vacate the order of the district court and remand for reinstatment of the jury verdict in favor of the plaintiffs. On remand the district court may consider the contentions of the defendant contained in the Motion for a New Trial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAL R. BHAYA,	:	CIVIL ACTION
RICHARD CARNER,	:	
WILLIAM J. HAESSLER,	:	
HENRY A. PARZICK, and	:	
EARLE WILLIAMS	:	
v.	:	
WESTINGHOUSE ELECTRIC	:	
CORPORATION	:	NO. 84-5381

OPINION

Lord, S.J. March 12, 1989

In November 1985, a jury found that defendant's decision to lay off plaintiffs in December 1982 while retaining certain younger employees was the product of willful discrimination based on age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §623(a) ("ADEA"). Defendant moved for judgment n.o.v. or a new trial. I granted judgment n.o.v. and did not reach the new trial motion. The Court of Appeals for the Third Circuit reversed, and now has remanded the case for me to consider the defendant's new trial motion. *Bhaya v. Westinghouse,* 832 F.2d 258 (3d Cir. 1987), *cert. denied,* 57 L.W. 3447 (1989).

Defendant claims a new trial is warranted for numerous reasons. I will discuss only those two grounds which are meritorious. One concerns purported hearsay; the other concerns evidence that defendant laid off other employees after plaintiffs. For the reasons which follow, I will grant defendant's motion for a new trial.

I. Standard of Review

A motion for a new trial on the basis of alleged trial error requires two inquiries: whether an error was in fact made; and whether that error was so prejudicial that

refusal to grant a new trial would be "inconsistent with substantial justice." Fed.R.Civ.P. 61. With respect to an evidentiary error, the test under the second inquiry is that a new trial must be granted unless "it is highly probable that [the erroneous ruling] did not affect the [objecting party's] substantial rights." *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985); *cf.* Fed.R.Evid. 103(a).

II. Purported Hearsay

Defendant contends that I erroneously admitted out-of-court statements by an unidentified person. While one of the plaintiffs, Henry Parzick, was being questioned by his attorney, the following exchange took place:

> Q: What else occurred on that day . . . ?
>
> A: One point of interest after the meeting, I did speak to Mr. Kinlin. We just chatted, and he informed me that at a meeting that he attended—
>
> Q: Can you explain who that gentleman is?
>
> . . .
>
> A: He was my immediate supervisor.
>
> . . .
>
> Q: What did he tell to you?
>
> A: He told—
>
> MS. KAHN [defendant's attorney]: Objection, Your Honor. If he's going to tell us what was told third-hand to this person, it's hearsay.
>
> . . .
>
> THE COURT: [Sustained objection on basis that no foundation for hearsay exception had been established.]

Q: Can you please tell us what Mr. Kinlin said to you in the context of your employment at Westinghouse on that particular day subsequent to his initial meeting with you?

A: Mr. Kinlin told me that at a meeting that management held at which he was present, a discussion was held regarding our termination.

MS. KAHN: Objection, Your Honor.

THE COURT: No, overruled.

A: *Somebody in that meeting brought up the point that they might be violating—*

MS. KAHN: Objection.

A: *—the labor laws of their contract.*

MS. KAHN: Objection, Your Honor. . . .

. . .

THE COURT: I overrule the objection.

Q: Mr. Parzick . . . please tell us again what Mr. Kinlin told you.

A: Yes. This meeting, it was an executive meeting, the statement was made—

THE COURT: Wait a minute. You know, with your familiarity with the company — you have been with them how long?

A: Forty years less two months or so.

THE COURT: Do you know what an executive meeting is?

A: Yes. People, all the people attending on management level or above.

THE COURT: Okay, all right.

Q: In keeping with that, sir, can you again tell me exactly what Mr. Kinlin said, to the best of your recollection?

A: *A statement was made that maybe we shouldn't be eliminating this group. Maybe we're doing something illegal or against the contract,* and Mr. Nick Kulokoski, who was the personnel manager of the division, said, let's give it a try. What do we have to lose?

MS. KAHN: Objection, Your Honor.

THE COURT: Overruled.

A: That's the basis of — that's exactly what I was told.

N.T. Day 1:96-103. (Emphases added)

Defendant renews its objection that Parzick's testimony about what the unidentified person allegedly said (emphasized above) at the reported management meeting was inadmissible. Defendant maintains that Parzick's testimony contained double hearsay which was inadmissible under Fed.R.Evid. 805 because at least one, if not both, of the parts of the combined statements did not conform with any exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(D) in particular.

The first question is whether Kinlin, had he been the witness rather than Parzick, could have testified about what the unidentified person allegedly said. Defendant contends that this case is indistinguishable from *Carden v. Westinghouse,* 850 F.2d 996 (3d Cir. 1988). In *Carden,* another employment discrimination case, the district court permitted the plaintiff to testify, in an effort to show why he had been dismissed, that his immediate supervisor had told him "they wanted a younger person for the job." The district court concluded that the statement was an admission under Fed.R.Evid. 801(d)(2)(D). The Third Circuit held that to be reversible error, because plaintiff had not established who the

unidentified "they" were who had told the supervisor they wanted a younger employee. Without knowing who "they" were, it could not be established that "they" were speaking about a matter within the scope of their employment. *Id.* at 1002.

The declaration at issue in *Carden* must be distinguished because the declaration here, "maybe we shouldn't be eliminating this group. Maybe we're doing something illegal or against the contract" was not, at least on its face, offered for the truth of the matter asserted: that the layoffs were illegal.[1] Rather, the unidentified person's declaration was offered to set the stage for Kulokoski's reported response "let's give it a try. What have we got to lose." Kulokoski's response, to which defendant has not objected, was offered to show defendant's corporate state of mind: that management recklessly disregarded the possibility that the layoffs violated ADEA. Of course, without the unidentified person's statement, Kulokoski's response would be meaningless. In short, the declaration here was what has been termed an utterance offered to show its effect on the hearer, and such utterances are not hearsay no matter who makes them. J. Weinstein and M. Berger, *Weinstein's Evidence,* ¶801(c); E. Cleary, Ed. *McCormick on Evidence,* §249.

As *McCormick* notes, however, utterances such as this one often have a hearsay aspect. Here, the jury might have jumped to the conclusion that because the unidentified person suggested the layoffs might be illegal, they were illegal. Unfortunately, I did not instruct the jury to confine their consideration of the declaration within proper boundaries.

The unidentified person's declaration created another, even more serious problem. While the declarant suggested the layoffs might be "illegal," he never said

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1. Indeed, the declaration could not have been offered for its truth since the question of the legality of the layoffs is a legal one, not a factual one.

what law he thought they might violate. In particular, he never mentioned age discrimination or ADEA. The jury could only speculate about whether the declarant and Kulokoski and whoever else attended the management meeting were conscious of the possibility that the layoffs violated ADEA. Defendant's managers might just as well have been concerned that by laying off plaintiffs, defendant would violate its collective bargaining agreement, and associated laws — "the labor laws of their contract" — rather than ADEA. The legality of the layoffs under the collective bargaining agreement or, for example, the National Labor Relations Act, was immaterial to plaintiffs' case. Likewise, Kulokoski's reported response gave no clue of what sort of illegality he was prepared to risk.

The unknown person's declaration, therefore, probably was irrelevant. If it was relevant, it was less probative than it was misleading and unfairly prejudicial. The jury probably was left with the impression that defendant's managers were a lawless bunch. That may have been true, but since there was no evidence that the managers were heedless of their duties *under ADEA,* their lawlessness was irrelevant.[2] I am convinced that the unidentified person's declaration would have been excluded under Fed.R.Evid. 403; if not Fed.R.Evid. 402. In the alternative, if it were admissible, it should have

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2. The attorneys for both parties probably added to the jury's confusion. In a question put later to Kinlin, defendant's attorney described Parzick's testimony as follows: "Mr. Parzick testified that you told him that you were at an executive meeting and someone said that maybe we shouldn't be eliminating the negotiation engineers, maybe we're violating the Age Act, and Nick Kulokoski said, 'Let's try it. What do we have to lose.' " N.T. Day 3-82. In his closing during the liability phase, plaintiff's attorney stated "Hank Parzick said unequivocally that he was told that Westinghouse knew that what they did was wrong, that Kulokoski said or was presented with a set of circumstances said, might not this be discrimination, might not this be a violation of state and federal statutes? And Kulokoski, according to Hank Parzick, said to Mr. Kinlin, who said to him, that, yes, let's take our chances." N.T. Day 6:74.

been accompanied by a cautionary instruction. It is quite possible that unknown declarant's statement affected defendant's substantial rights. Therefore, a new trial must be granted.

Defendant also contends that the unidentified person's statement should have been excluded because Kinlin, when recounting the discussion to Parzick, was not speaking of a matter within the scope of his (Kinlin's) employment. *See* Fed.R.Evid. 801(d)(2)(D). For the sake of completeness, I will explain why this aspect of defendant's objection is without merit. Parzick testified, before the disputed testimony was admitted, that Kinlin was plaintiffs' immediate supervisor. Kinlin's supervisory status carries with it the inference that it was within the scope of Kinlin's duties to talk to Parzick about the circumstances surrounding plaintiffs' layoff. Precisely the same foundation existed in *Carden*. 850 F.2d at 1001. The district court held that foundation to be adequate to satisfy Fed.R.Evid. 801(d)(2)(D), and the Court of Appeals for the Third Circuit said nothing later which suggests that the district court's holding was incorrect in that respect. (The appellate court found the other part of the double hearsay statement infirm.) *Id.*

Parzick also testified that Kinlin attended a meeting during which Parzick and two others were told by Mr. Borden, the acting department manager, that they were being laid off because their position was being eliminated. N.T. Day 1:93-95. Since Kinlin was privy to that meeting, this reinforces my conclusion that the subject of Parzick's layoff was a matter within the scope of his employment. Similarly, it is significant that Kinlin reportedly heard the exchange between the unidentified person and Kulokoski while attending a management meeting. Since Kinlin was privy to that management meeting, at which the layoffs were discussed, the subject of plaintiffs' layoff presumably was a matter within the scope of Kinlin's employment. This is far different

from a case in which Kinlin might have overheard two higher managers discussing the layoffs by the water cooler.

Defendant argues that *Hill v. Spiegel* advises the opposite conclusion. 708 F.2d 233 (6th Cir. 1983). The plaintiff in *Hill* was an executive before he was discharged. Several fellow employees allegedly had told him that was discharged because of his age. While those employees were identified as managers, none was identified as a superior *of the plaintiff.* Nor was there any evidence that they had attended meetings in which the plaintiff's discharge had been discussed. Therefore, *Hill* must be distinguished from this case.

III. Subsequent Layoffs of Availability Assurance Engineers

During the liability phase of the bifurcated trial and again during the damages phase, defendant sought to introduce evidence that availability assurance ("AA") engineers had been laid off soon after plaintiffs were laid off. N.T. Day 2:114-118 (liability); Day 8:151-157 (damages). Both times, I sustained plaintiffs' objection on the ground that what happened to the AA engineers was irrelevant. That remains my view with respect to the liability phase of the trial. I now conclude, however, that I should have permitted defendant to introduce its evidence during the damages phase of the trial.

The AA engineers were, as a group, younger than plaintiffs, who were called negotiation engineers. The duties of AA engineers were, according to plaintiffs' testimony, similar to those which plaintiffs performed. Plaintiffs' theory of liability was that defendant could have laid off the younger AA engineers and allowed plaintiffs to perform their duties. Defendant chose to retain the AA engineers because the negotiation engineers were older, plaintiffs claimed.

That defendant later laid off the AA engineers was irrelevant to the liability issue. Plaintiffs admitted that

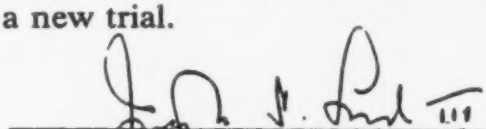
defendant's business had declined generally, requiring layoffs. Plaintiffs' contention was that the negotiation engineers were laid off *sooner* than others because plaintiffs were older. Defendant never offered evidence that AA engineers were laid off before or simultaneously with the negotiation engineers.

Evidence that defendant laid off AA engineers after plaintiffs were laid off was relevant, however, to damages. If plaintiffs would have been laid off for permissible reasons sometime after December 1982, then plaintiffs' damages should have been limited accordingly. Any subsequent loss of pay simply was not caused by defendant's discrimination. *Hebing v. Unclaimed Salvage & Freight Co., Inc.*, 489 F.Supp. 956, 963 (E.D. Pa. 1980) (back pay cut off at the time when the store in which plaintiff had worked as manager, was closed); *Welch v. University of Texas,* 659 F.2d 531, 535 (5th Cir. 1981) (back pay cut off at time when the grant which had funded plaintiff's position ended); *cf. Dillon v. Coles,* 746 F.2d 998, 1006 (3d Cir. 1984) (suggesting front pay should be of limited duration when plaintiff probably would have been fired for permissible reasons).

The remaining question is whether this erroneous exclusion of evidence warrants a new trial as to damages. In *McQueeney v. Wilmington Trust,* the Third circuit held that a new trial was necessary where the erroneously excluded evidence "might have persuaded the jury to award significantly less damages in lost earnings than it in fact did." 779 F.2d at 930. I am persuaded that a similar situation exists here. Therefore, a new trial is required.

IV. Conclusion

For the reasons I have stated, I will grant defendant's motion for a new trial.



Joseph S. Lord III S.J.

Filed December 28, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

89-2063

LAL R. BHAYA, and RICHARD CARNER, and WILLIAM J. HAESSLER, and HENRY A. PARZICK, and EARLE WILLIAMS,

Appellants

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 84-5381)

Argued: October 11, 1990
Before: MANSMANN, COWEN and ALITO, *Circuit Judges*

(Opinion Filed: December 28, 1990)

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OPINION OF THE COURT

ALITO, *Circuit Judge*:

This is an appeal from a final judgment following a jury verdict in favor of Westinghouse Electric Corporation ("Westinghouse") in a suit by five former Westinghouse engineers under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The plaintiffs contend that the district court erred in granting Westinghouse's motion for a new trial, in excluding certain evidence at the second trial, and in refusing to give a supplemental jury instruction at the second trial. We will affirm.

I.

The background of this case is set out in some detail in this court's prior opinion, *Bhaya v. Westinghouse Electric Corp.*, 832 F.2d 258 (3d Cir. 1987), which reversed the district court's entry of judgment notwithstanding the verdict following the first trial, and in the opinion of the district court granting a new trial on remand. *Bhaya v. Westinghouse Electric Corp.*, 709 F.Supp. 600 (E.D.

Pa. 1989). [1] Accordingly, a brief summary will suffice for present purposes.

The five plaintiffs held the position of "negotiation engineer" before Westinghouse eliminated that entire job progression in 1982. The plaintiffs claimed that Westinghouse eliminated their job progression, rather than making layoffs based on seniority from a pool consisting of the negotiation engineers and engineers in two other closely related job progressions (the "availability assurance engineers" and the "applications engineers"), because the negotiation engineers were older. After the first trial in 1985, the jury returned a verdict for the plaintiffs. Westinghouse then moved for a judgment notwithstanding the verdict, because of the asserted insufficiency of the evidence. In the alternative, Westinghouse sought a new trial because of alleged trial errors. The district court granted judgment notwithstanding the verdict and thus did not address the claimed trial errors that formed the basis for the new trial motion.

On appeal, this court reversed, holding that the evidence, when viewed in the light most favorable to the plaintiffs, was sufficient to support a judgment in their favor. 832 F.2d at 262. We therefore vacated the judgment notwithstanding the verdict but noted that the district court on remand could consider Westinghouse's as yet undecided motion for a new trial. *Id.* at 263.

On remand, the district court granted a new trial both on liability and damages. At the second trial, the jury found that Westinghouse was not liable, and the plaintiffs have appealed.

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1. *See also Bhaya v. Westinghouse Corp.*, 624 F.Supp. 921 (E.D. Pa. 1985) (addressing damages and attorney's fees following the first trial).

II.

A. We will first address the district court's decision to grant a new trial on liability. The district court's decision was based on the admission, over objection, of testimony by one of the plaintiffs, Henry Parzick, concerning out-of-court statements supposedly made at a Westinghouse management meeting. On direct examination, Parzick stated that his immediate supervisor, Thomas Kinlin, had related a discussion about the termination of the negotiation engineers that had occurred at the meeting in Kinlin's presence.[2] Asked what Kinlin had told him, Parzick testified as follows:

> Somebody in that meeting brought up the point that they might be violating . . . the labor laws of their contract.

When plaintiffs' counsel asked Parzick to state "exactly what Mr. Kinlin said, to the best of [his] recollection," Parzick testified:

> A statement was made that maybe we shouldn't be eliminating this group. Maybe we're doing something illegal or against the contract, and Mr. Nick Kulokoski, who was the personnel manager of the division, said, let's give it a try. What do we have to lose?

Thus, Parzick related out-of-court statements made by three individuals: Kinlin, who allegedly recounted the discussion at the management meeting; an unidentified attendee at the meeting,

2. Kinlin testified that he did not attend any management meeting at which the termination of the negotiation engineers was discussed, and he stated that he had no recollection of the conversation with Parzick.

who allegedly brought up the point that "they might be violating . . . the labor laws of their contract" and said that "[m]aybe [they] were doing something illegal or against the contract"; and Kulokoski, the division personnel manager, who allegedly responded, "[L]et's give it a try. What do we have to lose?"

In granting a new trial on liability, the district court focused on the statements of the unidentified attendee. The court concluded that the statements were not hearsay because they were offered, not for the truth of the matter asserted, but to show the meaning of Kulokowski's response ("[L]et's give it a try. What do we have to lose?"), which would have otherwise been meaningless. 709 F.Supp. at 602-03. While holding that admission of these out-of-court statements was not barred on hearsay grounds, the district court concluded that the unidentified declarant's statements were probably irrelevant (and thus inadmissible under Fed. R. Evid. 402) and that, even if relevant, they should have been excluded under Fed. R. Evid. 403. 709 F.Supp. at 603-04. The court explained that while the unidentified attendee reportedly said that the layoffs might be "illegal," he never stated that they might violate the ADEA. The court observed that the unidentified attendee's comments might just as well have concerned the possible violation of the collective bargaining agreement or labor laws but that these possible violations were immaterial in an age discrimination case. *Id.* Thus the court concluded that the unidentified declarant's statements should have been excluded or, in the alternative, accompanied by a cautionary instruction. *Id.* Applying the new trial standard set out in *McQueeny v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985), the district court held

that the erroneous admission of this testimony necessitated a new trial because it was "quite possible" that Westinghouse's "substantial rights" had been affected. 709 F.Supp. at 604.

B. When the granting or denial of a new trial is contested on appeal, substantial deference must generally be given to the decision of the trial judge, "who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart" (*Cove v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)). In *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980), where a new trial was granted based in part on erroneous evidentiary rulings, the Supreme Court stated that "[t]he authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." *See also Waldorf v. Shuta*, 896 F.2d 723, 737 (3d Cir. 1990); *Honeywell v. American Standards Testing Bureau*, 851 F.2d 652, 655 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 795 (1989); *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 921-22 (3d Cir. 1986); *Silverii v.Kramer*, 314 F.2d 407, 413 (3d Cir. 1963) ("It is well settled that the granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action thereon is not reviewable upon appeal, save in the most exceptional cases").

Particular deference is appropriate in the present case because the decision to grant a new trial rested on an evidentiary ruling that was itself entrusted to the trial court's discretion. Indeed, a trial judge's decision to admit or exclude evidence under Fed. R. Evid. 403 may not be reversed

unless it is "arbitrary and irrational."[3] *United States v. DePeri*, 778 F.2d 963, 973-74 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110 and 476 U.S. 1159 (1986); *United States v. Friedland*, 660 F.2d 919, 929 (3d Cir. 1981), *cert. denied* 456 U.S. 989 (1982); *United States v. Long*, 574 F.2d 761, 767 (3d Cir.) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal"), *cert. denied*, 439 U.S. 985 (1978).

Applying these deferential standards of review, we sustain the trial judge's decision to grant a new trial in this case. The trial court's conclusion that the testimony at issue should have been excluded under Fed. R. Evid. 403 was unquestionably neither arbitrary nor irrational but reflected an appropriate assessment and weighing of the prescribed considerations. Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jurors." Here, the trial judge had solid grounds for concluding that the out-of-court statements at issue had little if any relevance or probative value and that they created a substantial danger of "unfair prejudice", "confusion of the issues," and "misleading the jurors."

The out-of-court statements had little if any relevance or probative value because they lacked any appreciable link to age discrimination or the ADEA. According to Parzick's testimony, the

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3. The district court did not rule that the out-of-court statement was irrelevant but only that it "probably was irrelevant" (709 F.Supp. at 603). We note, however, that the trial court's ruling on relevancy would have been reviewable only for an abuse of discretion. *Pfeiffer v. Marion Center Area School District*, No. 90-3064, Slip. op. at 5 (3d Cir. October 30, 1990).

unidentified attendee specifically mentioned that terminating the negotiation engineers might violate "the labor laws of their contract" or "the contract." The most natural interpretation of this testimony is that it referred to a possible breach of the collective bargaining agreement. But in an age discrimination case, evidence that management was willing to risk a violation of its collective bargaining agreement would be relevant only if that fact made it "more probable. . . than it would be without the evidence" that management was also willing to risk a violation of the ADEA. Fed. R. Evid. 401. In our judgment, any connection between a willingness to risk a breach of the collective bargaining agreement and a willingness to risk a violation of age discrimination laws is remote at best.[4]

Even if the phrase "labor laws of the contract" is interpreted to embrace the entire body of employment law – an arguable although less plausible interpretation – the statement in question would still lack appreciable probative value, as does the unidentified attendee's additional statement that the termination might be

4. The dissent contends (dissenting typescript 5) that evidence of Westinghouse's willingness to risk a break of its collective bargaining agreement was relevant to rebut Westinghouse's defense that the collective bargaining agreement prohibited the company from spreading the reduction-in-force across the three engineering job progressions. Plaintiffs, however, never advanced this theory of relevancy. A trial judge's assessment of relevancy cannot be reversed on appeal based upon an entirely new theory not apparent on the face of the evidence. *See Campbell v. Nordco Products*, 629 F.2d 1258, 1264 (7th Cir. 1980); J. Weinstein & M. Berger, *Weinstein's Evidence* 401 [08] at 401-57 to 401-58 (1990) ("Except in a case where the evidence sought to be introduced is relevant on its face, the court may without error sustain an objection to its introduction if the attorney

"illegal" in some unspecified way. Because these broad and vague statements might have referred to countless forms of illegal conduct, the statements in themselves carry little probative weight in proving that management considered the age of the negotiation engineers in deciding to eliminate their jobs. Of course, the probative value of these statements would have been greatly enhanced if they had been uttered during a discussion relating in some way to the ages of the engineers affected by management's decision. But plaintiffs offered no such proof. Without some link to age, these broad and vague references had little probative weight in proving an ADEA case.

By contrast, the out-of court statements created a great danger of "unfair prejudice" (Fed. R. Evid. 403), which has been defined as an "undue tendency to suggest decision on an improper basis." Advisory Committee Note on Rule 403. Evidence that a party committed wrongs other than those at issue in a case often creates a danger of "unfair prejudice" because such evidence may influence a jury to return a verdict based on a desire to punish for the other wrongs.[5] *See* 10 *Moore's Federal Practice* § 403.10[1] at IV-75 & n.9 (1990); E. Cleary (ed.), *McCormick on Evidence* § 185 at 545 (1984); C. Wright & A. Miller, *Federal*

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fails to explain its significance.") (footnotes omitted); 1 J. Wigmore, *Evidence* § 17 at 782 (Tillers rev. 1983).

5. Although evidence that Westinghouse management was willing to risk a violation of the collective bargaining agreement or "labor laws" does not appear to fall directly within Fed. R. Evid. 404(b), this evidence is closely akin to evidence falling within this rule. Evidence falling within Rule 404(b) must be carefully analyzed under Rule 403. *See* Fed. R. Evid. 404(b) advisory committee's note.

Practice and Procedure § 5215 at 281. Here, the testimony indicating that Westinghouse management was willing to engage in conduct that might violate the "labor laws of the contract" or might be "illegal" in some unspecified way created just such a danger. As the trial judge aptly put it, "[t]he jury probably was left with the impression that [Westinghouse's] managers were a lawless bunch." 709 F.Supp. at 600. The jury might well have been influenced to return a verdict against Westinghouse simply because the jury disapproved of management's generally lawless attitude as portrayed by Parzick's testimony. Thus the testimony at issue here presented a textbook example of unfair prejudice.

For similar reasons, this testimony also created a great danger of "confusion of the issues." While the jury should have considered only whether Westinghouse had committed age discrimination, the testimony in question invited the jurors to ponder whether Westinghouse had violated "the labor laws of the contract" or whether it had committed other unspecified illegalities. By tending to divert the focus of the jury's attention in this way, the testimony injected a confusing factor into the case.

Finally, the testimony at issue created a substantial danger of "misleading the jury." The statement that termination of the negotiation engineers might violate the "labor laws of the contract" or might be "illegal" did not necessarily relate in any way to age discrimination; indeed, as previously observed, it seems more likely that these references pertained exclusively to the possibility of breaching the collective bargaining agreement. Yet the admission of these vague and suggestive statements in an age discrimination

case had a natural tendency to mislead. This danger is well illustrated by the following passage from the closing argument of plaintiff's counsel. Plaintiffs' counsel told the jury (709 F.Supp. at 603 n.2) (emphasis added):

> Henry Parzick said *unequivocally* that he was told that Westinghouse knew that what they did was wrong, that Kulokoski said . . . might not this be *discrimination*, might not this be *a violation of state and federal statutes*? And Kulokoski, according to Hank Parzick, said . . . yes, let's take our chances.

In fact, the out-of-court statements recounted by Parzick contained no mention of "discrimination" or the "violation of state and federal statutes." But admission of those statements in an age discrimination case tended to mislead by suggesting – without foundation – precisely what plaintiffs' counsel inaccurately claimed in his summation. In sum, the district court had ample grounds for concluding that the out-of-court statements in question should have been excluded under Rule 403.

Having identified this incorrect evidentiary ruling, the trial judge was required under *McQueeny v. Wilmington Trust Co.*, 779 F.2d at 928, to grant a new trial unless it was "highly probable" that the error did not affect any "substantial rights". No such conclusion was possible in the present case. Indeed, plaintiffs implicitly concede the importance of the out-of-court statements by arguing in this appeal that the exclusion of the same testimony at the second trial caused them "substantial prejudice" (Appellants' Br. 37) and thus constituted reversible error. *See* Fed. R. Civ. P. 61 (judgment may not

be set aside based on exclusion of evidence unless necessary to ensure "substantial justice"). Accordingly, it is apparent that the granting of a new trial on liability was justified.

III

Plaintiffs' remaining arguments clearly lack merit. The district court correctly held that a new trial should be granted on the issue of damages;[6] and in any event, the granting of a new trial on damages was inconsequential, since the district court properly granted a new trial on liability, the jury at the second trial found for Westinghouse on that issue, and plaintiffs have not asserted any sound basis for reversing the judgment entered following that verdict.

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6. As previously noted, plaintiffs claimed that Westinghouse, instead of terminating all the negotiation engineers, should have spread out necessary layoffs among the members of a larger pool that included the availability assurance and applications engineers. In part for the purpose of showing that any damages should be limited, Westinghouse sought to introduce evidence that some availability assurance engineers had been laid off shortly after plaintiffs, but the district court sustained plaintiffs' objections. In ruling on Westinghouse's new trial motion, however, the district court recognized that this evidence was relevant on the issue of damages because it tended to show that plaintiffs might have been properly laid off a short time later even if plaintiffs' suggestion about spreading out the layoffs had been followed (709 F. Supp. at 605).

On appeal, plaintiffs assert that some younger engineers were never laid off. The thrust of plaintiffs' argument appears to be that evidence of the layoffs of some availability assurance engineers was not relevant because that evidence did not conclusively show that plaintiffs would have been laid off at that time. This argument is fallacious, however, because evidence need not be conclusive in order to be relevant. *See* Fed. R. Evid. 401.

Plaintiffs contest the exclusion at the second trial of the out-of-court statements just discussed in relation to the first trial. However, the trial judge's decision to exclude those statements at the second trial[7] must be upheld for the same reasons already explained.[8]

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7. Contrary to plaintiffs' contention on appeal, it is apparent that the court at the second trial adhered to its earlier ruling that the out-of-court statements should be excluded under Rule 403. Counsel for Westinghouse argued this point at length, and the court sustained her objection.

During argument, the district court appeared to question whether Kinlin's out-of-court statement was inadmissible on another ground, i.e., lack of sufficient proof of the preliminary facts (see Fed. R. Evid. 104) necessary for introduction of that statement as an admission under Fed. R. Evid. 801(d)(2)(D). Because we conclude that the district court's exclusion of this evidence under Rule 403 was proper, we need not address this alternative ground for exclusion.

8. At the second trial, plaintiffs attempted to tie the out-of court statements to the subject of age. Parzick testified that after he was notified of his termination, he and Kinlin talked about "the differences in ages." Specifically Parzick testified:

> I told Mr. Kinlin, I said: "How can they do that to us old-timers? How can they really get rid of us old-timers?" And he said: "Hank, I really don't know. . ."

This additional testimony does not fundamentally alter the balance under Rule 403 or demonstrate that the district court's ruling was arbitrary or irrational. This new testimony indicates that Parzick raised the topic of age by referring to the negotiation engineers as "old timers." Arguably it indicates that Kinlin discussed the topic of age in his alleged conversation with Parzick. But this new testimony provides no evidence that age was discussed at the management meeting. Without such a link, the statements at that meeting still have little if any probative value.

We also reject plaintiffs' contention that the district court erred by refusing to admit as part of their rebuttal case an excerpt from the testimony given at the first trial by one of Westinghouse's witnesses, Charles A. Turnbull. Rebuttal evidence must generally tend to refute the defendant's proof, and a trial judge's decision regarding the scope of rebuttal may not be reversed unless there has been a clear abuse of discretion. *See Spesco, Inc. v. General Electric Co.*, 719 F.2d 233, 239-40 (7th Cir. 1983); *Martin v. Weaver*, 666 F.2d 1013 (6th Cir. 1981); *cert. denied*, 456 U.S. 962 (1982); *Hickok v. G.D.Searle & Co.*, 496 F.2d 444 (10th Cir. 1974); 3 J.Weinstein & M. Berger, *Weinstein's Evidence* 611 [1] at 611-30 8 n.45 (1990); 6 J.Wigmore, *Evidence* § 1873 (Chadboum Rev. 1976). The trial court properly exercised that discretion in the present case because the excerpt from Turnbull's prior testimony merely stated in slightly different language what another defense witness said at the second trial.

As this court explained in its prior opinion, the plaintiffs contended that Westinghouse, instead of terminating all of the negotiations engineers, could have spread out seniority-based layoffs among the availability assurance and applications engineers as well. 832 F.2d at 261. To support this theory, the plaintiffs presented testimony that they were qualified to perform the work of the engineers in the other job progressions and that "the tasks could have been transferred without a change in plaintiffs' job description." *Id.*

As part of its effort to refute this theory at the first trial, Westinghouse called Turnbull, who "testified that the job tasks could not have been transferred without engaging in collective bargaining unless assumption of those tasks would

have required no revision of the plaintiffs' job description." 832 F.2d at 261. At the second trial, Westinghouse called Robert McBurney, who held the position of Corporate Human Resource Director and who gave essentially the same testimony as Turnbull had at the first trial regarding the transfer of job tasks from the availability assurance engineers and the applications engineers to the negotiations engineers. Although McBurney's direct and cross-examination on this point were extensive, the similarity of his testimony to Turnbull's is illustrated by the following question and answer on direct examination:

> Q. Can you transfer some duties that don't change the job description without bargaining?
>
> A. If the duties are already covered in the job description and they are exactly the same kind of functions already performed.

Since McBurney's testimony was substantially the same as Turnbull's, the district court properly exercised its discretion in excluding the transcript of Turnbull's testimony.[9]

Finally, we hold that the district court did not err in refusing to give a third supplemental jury instruction on circumstantial evidence. When the trial judge initially instructed the jury, he included a full and accurate instruction on circumstantial

9. Before excluding the Turnbull transcript excerpt on the ground that it was essentially the same as McBurney's testimony, the district court stated that plaintiffs had not given notice of their intention to offer Turnbull's prior testimony, as required by Rule 21 of the Rules of the United States District Court for the Eastern District of Pennsylvania. Because we hold that Turnbull's prior testimony was properly excluded on another ground, we need not address the effect of Local Rule 21.

evidence. After deliberating for some time, the jury reported that it could not agree and requested a clarification of the difference between types of evidence. In response, the judge again provided an accurate explanation of direct and circumstantial evidence. Plaintiffs' counsel did not object to this instruction but asked the court to make clear that the plaintiffs could sustain their burden of proof by circumstantial evidence, and the court did so. Following this clarification, one of the jurors asked whether age discrimination could be proven simply by showing that an employer had laid off older, qualified workers while retaining younger workers or whether there must be "an intention on the part of the company to discriminate." The court responded there must be proof that age was a determining factor in the employer's decision.

Plaintiffs' counsel objected that the court's answer "made it sound as if the employer had to make an affirmative statement and/or take affirmative action as demonstrated by 'direct evidence.'" The trial judge ruled, however, that he had already explained that an employer's intention could be inferred from circumstantial proof.

A trial judge's instructions to a jury must be "considered as a whole, to determine whether they are misleading or inadequate." *Savarese v. Agriss*, 883 F.2d 1194, 1202 (3d Cir. 1989). Unless a trial judge misstates the law, the judge's rulings on points for charge may be reversed only if the judge committed an abuse of discretion. *Id.* In this case, the district court's instructions on direct and circumstantial evidence and on age discrimination were correct, and the court soundly exercised its discretion in refusing to give additional supplemental instructions covering the same matters that had already been explained fully and

accurately. Having given correct and complete initial instructions, detailed supplemental instructions, an additional clarification requested by plaintiffs' counsel, and an accurate response to a juror's question, the district court was not required to do any more.

The judgment of the district court will therefore be affirmed.

MANSMANN, *Circuit Judge*, dissenting.

I respectfully dissent because I believe that the district court committed legal error in two respects: (1) in overturning the first jury's verdict in favor of the plaintiffs and in granting a new trial on the erroneous basis that the testimony of Henry Parzick was irrelevant and prejudicial and in excluding Parzick's testimony at the second trial; and (2) in the second trial, by responding to the jury's questions by language that was incomplete, confusing and misleading with respect to the plaintiffs' burden of proof in circumstantial cases of employment discrimination. I would reinstate the first jury's liability verdict for the plaintiffs and remand for a new trial on damages.

I.

We have repeatedly emphasized that direct evidence in the form of a "smoking gun" is not required to prove discrimination. *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989) ("there is usually no 'smoking gun'

evidence of intentional discrimination"); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 895 (3d Cir.)(in banc), *cert. dismissed*, 483 U.S. 1052 (1987) ("[b]ecause the plaintiff may meet in alternate ways his burden to show that age was a determinative factor in his discharge, the plaintiff is entitled to show that the employer's explanation was pretextual by proffering evidence which is circumstantial or indirect as well as that which shows directly discriminatory animus"); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 791 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986) (employer statements to the employee that s/he is being fired because of age will often be difficult to obtain); *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984) (in employment discrimination cases direct evidence of the employer's motivation is unavailable or difficult to acquire).

The allocation of burdens of proof and persuasion provided in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), make clear that not only is "smoking gun" evidence not required, but a specially tailored burden-shifting mechanism is available to a plaintiff who cannot produce direct evidence. *See Gavalik v. Continental Can Co.*, 812 F.2d 834, 853 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) (proof of discrimination under ERISA employs *Burdine* shifting burden mechanism where direct "smoking gun" evidence is unavailable).

I would hold the excluded testimony of Henry Parzick to be both highly relevant and admissible as an admission of a party opponent. The record as a whole provides the context in which the statement is relevant and lays a proper foundation for a party opponent admission under Federal Rule

of Evidence 801 (d)(2)(D). A more complete review of the evidence produced at the first trial[1] makes this clear.

II.

Although the panel majority accurately summarizes the parties' contentions, additional facts are necessary to explain the relevance of the excluded testimony. While admitting that declining sales had necessitated the reduction-in-force, Westinghouse contended that it was precluded from transferring the plaintiffs to different job progressions by the collective bargaining agreement. Throughout the trial, Westinghouse asserted that it sought conscientiously to conform to the terms of the collective bargaining agreement in terminating the plaintiffs.

At the same time, Westinghouse manager James Borden testified that in deciding to eliminate the negotiation engineers, Westinghouse managers Borden and McIntyre had not considered plaintiffs' ages, pensions or salaries, however, Borden admitted he had recognized "years of service" as an "emotional issue". Borden testified that Westinghouse staff met weekly over a period of several months to consider reduction-in-force options. According to Borden, executive meetings were also held where Nick Kulokoski, manager of personnel relations, provided guidance on labor laws, the collective bargaining agreement, and compliance with discrimination laws. Despite these

1. Because I would hold that the district court erred in granting a new trial on this issue, I would not have the court reach the question of whether the district court properly excluded this testimony at the second trial. Obviously, I would hold it error for the district court to have subsequently excluded this testimony at the second trial.

numerous meetings, Westinghouse failed to document its assertions that its decision to eliminate negotiation engineers was based solely on economic necessity and that factors such as age, pension, or salary had not been assessed.

Plaintiff Henry Parzick testified that on November 3, 1982, he and other negotiation engineers were called to a meeting with James Borden and their supervisor Thomas Kinlin at which they were informed of their termination. Parzick testified, "[o]ne point of interest after the meeting, I did speak to Mr. Kinlin. We just chatted, and he informed me that at [an executive management] meeting he attended ... a discussion was held regarding our termination." Parzick then related, over objection, the statements of the unnamed manager and Nick Kulokoski. Parzick also testified that only "management level or above" personnel attended executive meetings. Contrary to the majority's characterization of Kinlin's testimony, in answer to plaintiffs' counsel, Kinlin testified equivocally concerning this conversation, stating that he could have had a "confrontation with Kinlin,... but that he could not remember it", however, Kinlin believed "Hank" (Henry Parzick) and did not believe he was lying when he testified. Given the verdict for the plaintiffs, it is highly probable that the jury believed Parzick rather than Kinlin.

III.

Keeping in mind that "smoking guns" are rarely available to the plaintiffs in employment discrimination cases, the evidence proffered at the first trial was clearly sufficient to establish the relevance of Parzick's testimony. Borden established that staff and management held weekly

meetings to discuss layoffs. While he asserted that the plaintiffs' ages were not considered, he conceded recognition of the emotional impact of the plaintiffs' long years of service when deciding to terminate the plaintiffs.

Borden also established that Nick Kulokoski, who allegedly stated "Let's give it a try. What do we have to lose?", advised management regarding compliance with the collective bargaining agreement and discrimination laws. Further, a compartmentalized differentiation between Westinghouse's alleged disregard of the collective bargaining agreement and age discrimination laws ignores the fact that age and seniority often are related and that pensions accrue according to both age and the collective bargaining agreement.

It was certainly for the jury to assess the credibility of Westinghouse's assertion that it never considered the financial implications of terminating groups of employees, specifically, relative savings in salary and pensions, which are tightly linked with age and seniority. Finally, even if one agrees with the majority that Parzick's testimony was not relevant to the plaintiffs' affirmative claim of age discrimination, it was undeniably relevant to challenge Westinghouse's defense that it could not have spread the reduction-in-force across the three engineering job progressions because the terms of the collective bargaining agreement precluded it from doing so. Because the plaintiffs could have met their burden by proving that Westinghouse's alleged business reasons were pretextual, Parzick's testimony was improperly excluded as irrelevant.

With respect to the district court's ruling that Parzick's testimony was unfairly prejudicial under Federal Rule of Evidence 403, I do not disagree with the panel majority's use of the abuse of discretion standard of review, but rather with the application of this standard to these facts. To be excluded under Rule 403, evidence must be *unfairly* prejudicial; mere prejudice cannot suffice because "virtually all evidence is prejudicial or it isn't material." *Carter v. Hewitt*, 617 F.2d 961, 972 n.14 (3d Cir. 1980). Quoting Weinstein, we have stated that evidence is unfairly prejudicial if it

> "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish," or otherwise "may cause a jury to base its decision on something other than the established propositions in the case."

Carter, 617 F.2d at 972.

The declarant's statement mentioned "violating . . . the labor laws of their contract" or "doing something illegal or against the contract." Even if the illegality referred to age discrimination and not the contract, the district court found the statement substantially prejudicial because the jury may have viewed Westinghouse managers as a "lawless bunch."

But Westinghouse itself proffered the defense that it never considered plaintiffs' ages and at all times conformed to the terms and restrictions of the collective bargaining agreement. So it was certainly material to Westinghouse's defense that it at all times tried to conform to the collective bargaining agreement. Given that Westinghouse repeatedly emphasized such efforts to conform to the collective bargaining agreement, the plaintiffs' one bit of evidence that Westinghouse may not

have so scrupulously concerned itself with the collective bargaining agreement cannot be said to violate the *Carter* standard.

Logically relevant and not fairly prejudicial, Parzick's testimony was admissible as a party opponent admission under Federal Rule of Evidence 801 (d)(2)(D). A statement qualifies as such an admission when

> [it] is offered against a party and is ... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

This rule requires that the declarant be both authorized and acting within the scope of employment, when making an admission on behalf of the defendant. *See Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1002 n.6 (3d Cir. 1988). Both statements, "[m]aybe we're doing something illegal or against the contract" and "let's give it a try ... [w]hat do we have to lose?," were made by high level executives authorized to speak on behalf of Westinghouse. Both statements were made during a meeting limited to Westinghouse executives which concerned reduction-in-force options. *See Cline v. Roadway Exp., Inc.*, 689 F.2d 481, 488 (4th Cir. 1982) (admitting evidence by employees of statements made by "managers, some specifically identified," at managers meetings indicating some evidence of age discrimination). *Cf. Carden*, 850 F.2d at 1002 (supervisor's statement that "they wanted a younger person" failed to identify "they" as foundation for admission); *Cedeck v. Hamiltonian Federal Sav. and Loan Ass'n*, 551 F.2d 1136, 1138 (8th Cir. 1977) (no admission because declarant unknown).

Moreover, one can infer from their presence at a meeting concerning the impending reduction-in-force that both the unnamed manager and Nick Kulokoski acted within the scope of their employment. For example, Nick Kulokoski, the personnel manager responsible for counsel on legal issues, acted within the scope of his employment when he evidenced Westinghouse's attitude: "Let's give it a try. What do we have to lose?" Westinghouse also cannot "compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman". *Lockhart*, 879 F.2d at 54 (rejecting limited view that a manager not associated with plaintiff's division could not make admission for company).

Where the employer is a corporate entity, we have recognized that a manager's comments may not be avoided if later disadvantageous to its litigation posture. *Id.* ("[w]hen a major company executive speaks, "everybody listens" in the corporate hierarchy..."). These facts suffice to lay the foundation that these managers acted within the scope of their employment. *Contra Stahell v. University of Mississippi*, 854 F.2d 121, 127 (5th Cir. 1988) (professor uninvolved in tenure decision could not make admission for school concerning denial of tenure); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) (admission made by managers uninvolved in decision to discharge plaintiff made outside the scope of their agency).

Both the unnamed declarant's and Nick Kulokoski's statements constituted party-opponent admissions.[2] The admissibility of a Rule

2. Kinlin's declaration to Parzick also satisfies Rule 801(d)(2)(D)'s foundation requirements because Kinlin's statement to Parzick coincided with the meeting at which Parzick was terminated.

801(d)(2)(D) admission does not depend on the plaintiff's ability to name a corporate officer making a damaging admission on behalf of the corporation; rather, identification which establishes the requisite foundation suffices. *See Dudding v. Thorpe*, 47 F.R.D. 565, 571 (W.D. Pa 1969). The name of the unnamed declarant, given the fact that he commented upon the legality of the termination decision, is unnecessary because the characteristics attributable to the declarant based on the context of the statement satisfy the requirements for a party opponent admission. *Dudding*, 47 F.R.D. at 571 (authorized statement of an unnamed nurse who observed the alleged tort in the recovery room would be admissible against the hospital).

Corporations do not proclaim boldly their intent to discriminate and rarely embrace discriminatory statements made by their managers. Yet these people are the ones who act for the corporation and because corporate entities can speak only through employees, managers' articulations may be the only ones evidencing corporate discriminatory intent. If corporate parties are not immune from making Rule 801(d)(2)(D) admissions, then managers' statements made in the scope of their employment must be given the effect of an admission.

IV.

To reverse for a confusing or misleading jury instruction, we "must be left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations". *United States v. Traitz*, 871 F.2d 368, 383 (3d Cir.), *cert. denied*, 110 S. Ct. 78 (1989). I am left with such a doubt given the circumstances of the supplemental

instruction received by the jury within ten minutes of its defense verdict.

The initial charge instructed the jury on the burden of proof as well as direct and circumstantial evidence. After retiring to deliberate at 12:40 p.m., the jury returned with questions at 4:20 p.m.[3] The court correctly reinstructed on the difference between direct and circumstantial evidence, whereupon the jury was dismissed briefly. After the jury reentered at 4:33 p.m., the court gave the following charge:

> [In answer to the first question:] No. If it was pure happenstance, if there was no design at all, no reason why these men's names should come out and they were older, if it was pure happenstance as I say and not by any design, no, Westinghouse would not be liable.
>
> But if you analyze it, from the very definition that I gave you, it means that that must have been a part of the intention of Westinghouse, because I said to you that age must be a "determining factor." That means, of necessity, that the employer must have determined that, because you can't have a "determination" in a

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3. As read into the record by the district court, these questions were:

> 1. "We are split on our verdict. However, there may be a change of opinion if Westinghouse is still guilty if they [sic.] discriminated by chance rather than by design".
> 2. "If a juror says that he does not know why Westinghouse made the decision to layoff employees the way they [sic.] did, should he vote to convict [sic.]?"
> 3. "What is evidence? Please define the word evidence."

vacuum. It has to be somebody's determination to make it a "determining factor."

So, therefore, it must be one of the things that influenced Westinghouse. In fact, the thing, one of the things that determined Westinghouse to do the, to act in the way it did.

[In answer to the second question:] No. Because the plaintiff has the burden of proof as I mentioned to you, and if the plaintiff hasn't proven why they did this, then the plaintiff has not sustained the burden of proof.

Plaintiffs' counsel then asked the court to reiterate that the plaintiffs could meet their burden of proof with circumstantial evidence. The court complied.[4]

At this point, another juror asked an additional question "hav[ing] to do with the actual definition of age discrimination": "If ... Westinghouse laid off older workers and retained younger ones, and if they were all fully qualified, [etc.], is that ... in and of itself age discrimination?" In response, the court stated: "If the age ... was "a determining factor" in making that decision, that would be age discrimination." The juror responded: "but ... if it was not known, it was decided by the individual making this consideration that it was not known why the decision or how the decision was made, why the decision was made to do "this versus this," the mere fact of laying off the older workers and retaining the younger workers, is that age discrimination? You are saying that that is not, by itself. There has to be an intention on the part of

4. The district court charged: "Circumstantial evidence is just as good as direct evidence, provided it leads you to, to a conclusion 'by a preponderance of the evidence.' In other words, it leads you to balance the scales; balances the scales or unbalances them. ... You can't speculate; no, of course."

the company ... to discriminate on the basis of age." The court: "The employer must consider age to be a determining factor in reaching it's [sic.] decision." Plaintiffs' counsel obtained an exception, articulating his concern that the jury "ha[s] left here with a feeling that they need [to] find direct evidence of the employer's intention, ... and I would ask ... that that question ... be answered ... to include that they can find "intention" and they can find "intentional action" both through direct and circumstantial evidence."

In my view, this last question evidences at least one juror's continuing confusion over the relationship between types of evidence and the burden of proof. Because the jury returned a defense verdict within ten minutes of retiring after this last question, I am left with a "substantial and ineradicable doubt" as to whether the instructions allayed the jury's evident confusion concerning the type of evidence required to meet plaintiffs' burden of proof. Although the district court repeatedly defined circumstantial evidence, I believe that at least one juror was confused as to whether direct evidence was needed to show Westinghouse's discriminatory intent and therefore that the jury may have rendered a defense verdict even though it concluded that Westinghouse's explanation was pretextual.

Based on the foregoing I would summarize my departure from the majority as follows. At the first trial, although I agree with the panel majority that Westinghouse should have had the opportunity to show mitigation of damages, I would reinstate the verdict reached as to liability because I believe the statements made by Westinghouse managers were admissions relevant to age discrimination.

With respect to the second trial, I would reverse because the district court precluded the highly relevant admissible testimony of Henry Parzick and because I am convinced that the charge confused and misled the jury such that the jury believed that the plaintiffs had to prove discriminatory intent by direct evidence.

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Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-2063

LAL R. BHAYA, and RICHARD CARNER, and WILLIAM J. HAESSLER, and HENRY A. PARZICK, and EARLE WILLIAMS,

Appellants

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Appellee

(D.C. Civ. No. 84-5381)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge,*
SLOVITER, BECKER, STAPLETON,
MANSMANN, GREENBERG, HUTCHINSON,
COWEN, NYGAARD and ALITO, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Chief Judge Higginbotham and Judge Mansmann would have granted rehearing.

BY THE COURT:

Circuit Judge

DATED: JAN 24, 1991